

THE MEDIATION OF FAMILY DISPUTES IN TERMS OF THE CHILDREN'S ACT 38 OF 2005: EXPERIENCES AND VIEWS OF SOCIAL WORKERS

by

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DECLARATION

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ABSTRACT

Conflict is pervasive in society and is especially prevalent in families. The nature of social work has meant that social workers have inevitably played a large role in resolving conflict. A methodology that has long been employed to resolve conflict is mediation. In recent years the value of mediation has been increasingly recognised and has seen changes in the law to formalise mediation in the dispute resolution process. The entrenchment of mediation in the law has coincided with a recognition that social workers are appropriate mediators of family conflict.

Mediation has traditionally fallen into one of three different kinds: facilitative mediation, evaluative mediation and transformational mediation. In recent years a hybrid approach has also been adopted by some mediators.

Changes brought about by the Children's Act 38 of 2005 mirror the international shift to mediation as an appropriate dispute resolution mechanism in family disputes. The Children's Act names social workers as appropriate mediators in a wide variety of disputes and the involvement of the social worker includes eliciting the participation of the child in decisions regarding the child.

The goal of the research was to provide an insight into the role of social work mediators mediating family disputes in terms of the Children's Act 38 of 2005. The research approach taken has both qualitative and quantitative features. The research design was exploratory and descriptive because of the lack of existing research in the field in South Africa. However, there is literature available internationally on the topic and this international literature was used as a frame of reference for the study to compose a literature review which then was used to design a semi-structured questionnaire.

The sample was drawn by using a snowball technique in that social worker mediators were recruited and asked to identify other social workers whom they knew to meet the criteria for inclusion and who would be prepared to participate in the study. This process continued until saturation point was reached. In total the sample comprised of seventeen (n=17) participants. The researcher e-mailed the questionnaire to each participant, and each participant was given

the opportunity to raise any queries regarding the questionnaire in a follow-up telephone call from the researcher.

The most prominent findings are that mediation as a dispute resolution methodology offers benefits to disputing parties and to the children affected by conflict. It is a useful skill and tool for the social worker who is approached to help parties resolve a dispute. Social workers practising mediation in South Africa tend to supplement the social work skills with mediation and domestic violence knowledge in order to provide a professional service to clients and mitigate the risk carried in a developing mediation system.

Based on these findings several recommendations and areas for further research were identified.

OPSOMMING

Konflik kom algemeen in die samelewing en in gesinne voor. Weens die aard van maatskaplike werk speel maatskaplike werkers noodwendig 'n groot rol in konflikoplossing. Mediasie is 'n metode wat lank reeds aangewend word om konflik op te los. In die laaste jare is die waarde van mediasie toenemend erken en is veranderinge om mediasie in die dispuutoplossingproses te formaliseer sigbaar in wetgewing. Die insluiting van mediasie in wetgewing het saamgeval met 'n erkenning dat maatskaplike werkers geskikte mediators is om gesinskonflik te hanteer.

Mediasie word tradisioneel as een van drie soorte beskou: fasiliterende mediasie, evaluatiewe mediasie en transformerende mediasie. In die laaste jare word 'n hibriede benadering deur party mediators aanvaar.

Veranderinge wat deur die Kinderwet 38 van 2005 meegebring is, reflekteer die internasionale skuif na mediasie as 'n geskikte dispuutoplossingmeganisme in gesinsdispute. Die Kinderwet verwys na maatskaplike werkers as geskikte mediators om 'n wye verskeidenheid dispute te hanteer en ook om maatskaplike werkers te gebruik om kinders se deelname in besluite te verkry waar besluite die kind self raak.

Die doel van die studie was om insig te verkry in die rol van maatskaplikewerkmediators wat gesinsdispute in terme van die Kinderwet 38 van 2005 hanteer. Die navorsingbenadering wat gevolg is het beide kwantitatiewe en kwalitatiewe kenmerke. Die navorsingontwerp was verkennend en beskrywend as gevolg van die gebrek aan navorsing oor die onderwerp. Daar is egter internasionale literatuur beskikbaar oor die onderwerp. Hierdie internasionale literatuur is benut as verwysingsraamwerk vir die studie om 'n literatuurstudie saam te stel wat daarna gebruik is om 'n semi-gestruktureerde vraelys op te stel.

Die steekproef is verkry deur die gebruik van 'n sneeubaltechniek om maatskaplikewerkmediators te werf, wat dan versoek is om ander maatskaplike werkers te identifiseer wat aan die kriteria vir insluiting by die studie voldoen, en wat bereid was om aan die studie deel te neem. Die proses het voortgeduur totdat 'n versadigingspunt bereik is. In totaal het die steekproef uit sewentien (n=17) deelnemers bestaan. Die navorser het die vraelys

per epos aan elke deelnemer gestuur en die deelnemers het die geleentheid gehad om enige vrae te vra oor die vraelys in 'n opvolgtelefoonoproep van die navorser.

Die vernaamste bevindinge is dat die metode van dispuutoplossing voordele inhou vir partye wat 'n dispuut ervaar en ook vir die kinders wat deur konflik affekteer word. Dit is 'n nuttige hulpmiddel vir maatskaplike werkers wat genader word om partye te help om konflik op te los. Maatskaplike werkers wat mediasie in Suid-Afrika gebruik, neig om maatskaplikewerkvaardighede aanvullend tot mediasie te gebruik. Hulle gebruik ook hulle kennis oor gesinsgeweld om 'n professionele diens vir diensverbruikers aan te bied en om die risiko wat deel is van 'n ontwikkelende mediasie sisteem te verlig.

Verskeie aanbevelings en areas vir verdere navorsing is identifiseer, gebaseer op die voorafgaande bevindinge.

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CHAPTER 1

INTRODUCTION

1.1 RATIONALE FOR STUDY

The Children's Act 38 of 2005 gives prominence to mediation as a mechanism for conflict resolution in family disputes (Sections 21, 33, and 49). Mediation is not a new concept or intervention but the expectations on the mediator have changed, as mediation has evolved as a methodology (Mayer, 2004). Family and divorce mediation has been informed by existing theory on family, and particularly theory on conflict in families (Folberg, Milne & Salem, 2004; Robinson, Parkinson, 1985). As this theory evolves, the perceived role of family mediators in helping families in conflict evolves.

As legislation regarding the place of mediation of family disputes has changed, at the same time theory on family conflict has evolved, and the understanding of mediation has been influenced by it. These changes have influenced the role of the mediator, who, on top of these changes, brings his/her own life experience, culture and expectations of conflict to the mediation process (Marlow, 1994; Mayer, 2004; Robinson, 1985; Hirschowitz, 1995).

It is worth noting that adjustments to the Children's Act 38 of 2005 represents a major change in family law. The Act attempts to bring all law dealing with children under one legislation and repeals a number of Acts "most familiar to family lawyers" (Schafer, 2007: 49).

One of the innovations of the adjusted Act is the move to codifying best interests of children (Skelton, 2008). The Act stipulates the formula for 'best interests' (Section 7) and insists that children be involved in decisions involving them (Sections 10, 31). While the 'best interests' principle has been the 'golden thread running through family law' (Skelton, 2008), it is not until the promulgation of the adjusted Children's Act in 2007 that these best interests have been codified.

Moreover, the Act brings about a strong child focus and changes terminology and meaning around the traditional notions of guardianship, custody, and access (Skelton, 2008). The terms "custody" and "access" are replaced by "care" and "contact" as the focus shifts to the child's rights. This change in emphasis affects the centrality of the child's needs (Section 7), especially

when there is a dispute between divorcing parents and the child's future is affected by any decisions (Sections 10, 31).

The Act also refers to parental rights and responsibilities which include guardianship, care, contact and support. In the case of unmarried parents, these rights and responsibilities automatically attach to a mother over the age of eighteen. In order to ascertain whether the father accrues these rights and responsibilities he must satisfy the tests laid out in section 21 of the Act. Biological parents of a child have full parental rights and responsibilities (Section 20) if they are married (sc 20(a)), or were married at the time of the child's conception (Section 20(b)(i), birth (Section 20(b)(ii)), or any time between conception and birth (Section 20(b)(iii)). Section 21 determines that disputes regarding the status of an unmarried father must be mediated.

The Children's Act takes a bold stand on appropriate dispute resolution in the case of matters involving children. As a consequence of considering the best interests of children and the shift in parental responsibilities and rights, the Act recognizes the importance of a collaborative approach to settling disputes, and makes provision for alternatives to the litigation process. Mediation is introduced as the appropriate dispute resolution mechanisms for a number of types of family disputes.

Of importance for this study is that the Act routinely states that if a dispute arises over an issue, that the issue should be referred for mediation. The circumstances are: where unmarried parents dispute the paternity (and acquiring of parental rights and responsibilities of the child) (Section 21), where parents are separating or divorcing (Section 33), and in Children's Court matters the presiding officer deems appropriate for mediation (Section 49).

Furthermore, the Act states that disputes may be referred to a family advocate, social worker, social service professional or other suitably qualified person (Section 21 (3)(a)). The regulations governing the Act are silent on the definition of "other suitably qualified person", despite the draft regulations hinting at who this may be. The regulations in their final form give no clarity regarding what is meant by "other suitably qualified". This opens up a debate as taken up by Mmusinyane (2008) in his research, where it is argued that attorneys are suitable mediators in terms of the Act.

Literature (Haynes, 2004; Landau, 1997; Mayer 2000; Parkinson, 1997) on mediation abounds with guidelines and codes governing the conduct of mediators. The history of mediation is traced from early indigenous communities throughout the world and has involved into a highly nuanced discourse. This discourse carries with it the challenge of intersecting typologies of psychology, social work and law. The Children's Act, by placing these professions together as appropriate sources of mediators, perpetuates this challenge.

It is generally accepted that mediation involves a third party to help parties reach agreement (Haynes, 2004: 15). It is the researcher's experience as a professional mediator, that the interpretation of the role of an 'objective third party' has wide interpretations. Mediators seem to fall into a continuum from those who see themselves as experts handing solutions to people in conflict, to mediators who take a non-directive approach to the mediation process and allow the individuals to negotiate the content of the final agreement, treating the individuals as the experts.

Modern authors (Folberg, 2004) on the topic of mediation have identified three approaches to mediation: facilitative, evaluative, and, more recently, transformative. In each of these approaches the mediator sees his role differently and the tools he/she will use to move parties to agreement will differ. While mediation is identified as a useful tool for dispute resolution in families, what a mediator does may differ widely from mediator to mediator.

A search of the Sabinet database (on 19/10/2017) reveals that there is currently no current or completed research on the topic of social workers mediating in terms of the Children's Act 38 of 2005. Furthermore, a search of the Sabinet database of current and completed research dealing with family mediation returns only ninety nine studies, only one of which was completed after 2010, when the Act was fully implemented. That study, completed in 2012, related to family mediation in Gurage, Ethiopia and has little relevance for mediation in terms of the Children's Act 38 of 2005 in South Africa. A search of the topic of the role of the social worker mediator returns 27 studies, none of which relates to the Children's Act 38 of 2005. Based on this it is apparent that a gap exists in literature regarding the Children's Act 38 of 2005 in general and the role of the social worker mediator mediating in terms of the Act in particular.

1.2 PROBLEM STATEMENT AND FOCUS

The adjustments to the Children's Act 38 of 2005 has far-reaching implications for the practice of social work in South Africa. The Act gives prominence to mediation as a methodology for intervening in disputes and identifies mediation as the appropriate intervention in various types of family disputes.

Literature (Folberg, 2004; Mayer, 2000; Haynes, 2004) indicates that there are different approaches to mediation, and different understanding of mediation. Some of these differences could be ascribed to the different typologies of the professionals mediating conflicts, whereas others could be ascribed to cultural mores, values and methodologies employed to resolve conflict.

The social worker mediating in terms of the Children's Act has various theoretical, cultural and legal sources to draw from. However, in implementing an Act utilizing new language and meanings the social worker must make many professional decisions regarding style, methodology, ethics, and cultural sensitivity. Guidelines are necessary in order to help social workers operate within a meaningful framework to make these nuanced practice decisions regarding the role of the social worker in mediation. Despite these complex intersecting factors, social workers mediating in South Africa have little research to draw on to inform their practice of mediation (Sabinet database). This study will seek to contribute towards meeting the need for research into the role of mediators in the South African context by exploring the experiences of social workers mediating in terms of the Children's Act 38 of 2005. The research question for the study is therefore: What is the role of social workers mediating family disputes in terms of the Children's Act 38 of 2005?

1.3 GOAL AND OBJECTIVES

The goal of the research is to provide an insight into the role of social work mediators mediating family disputes in terms of the Children's Act 38 of 2005. Towards this end the objectives of the study will be:

- 1) to discuss the nature of family conflict leading to family disputes, and to describe the legal framework for parental and children's rights;

- 2) to explain the role of social workers mediating family disputes, with particular reference to the implications of the Children's Act 38 of 2005 for the mediator;
- 3) to investigate experiences of social workers mediating in terms of the Children's Act 38 of 2005;
- 4) to present conclusions and recommendations based on the findings of the study.

1.4 KEY CONCEPTS

1.4.1 Social work

The definition of social work utilized in this study is consistent with the definition used by the South African Council for Social Service Professions (SACSSP). The SACSSP defines social work as follows:

A practice based profession and an academic discipline that promotes social change and development, social cohesion, and the empowerment and liberation of people. Principles of social justice, human rights, collective responsibility and respect for diversities are central to social work. Underpinned by theories of social work, social sciences, humanities and indigenous knowledges, social work engages people and structures to address life changes and enhance wellbeing (<https://www.sacssp.co.za/Public>).

1.4.2 Social worker

For the purpose of this study, a social worker is a professional registered as such with the SACSSP in terms of the Social Service Professions Act 110 of 1978, as amended.

1.4.3 Family conflict

This study uses a broad definition of family conflict, including the interpersonal, conflict of interests and structural conflict defined by Roberts (2008) characterized by a mental struggle resulting from incompatible needs, drives, wishes, or external or internal demands.

1.4.4 Family disputes

A family dispute is defined as a sense of grievance over a specific issue, which is communicated as a contested claim to the person regarded as responsible or blameworthy (Roberts, 2008). This study focuses particularly on the disputes identified in the Children's Act 38 of 2005.

1.4.5 Mediation

For the purposes of this study mediation is defined as the alternative dispute resolution methodology by which disputing parties are helped in their negotiations (Haynes 2004).

1.5 RESEARCH DESIGN AND METHODS

1.5.1 Research approach

Delpont and Fouche (De Vos *et al*, 2011: 63) make the point that it is not always possible in social sciences to adopt a single approach to research. The difficulty with adopting one approach is that the reality of social science is often complex and requires the use of more than one method. In this study both quantitative and qualitative approaches are used.

De Vos, Strydom, Schulze and Patel (in De Vos *et al*, 2011: 23) identify participation and democracy as features of contemporary social work. In the contemporary social work environment, the client is an important determinant in their own development. This value strongly underpins the practice of the researcher in this study. The consequence of this value is that research must be attentive to the subjective experience of clients and provide an opportunity to explore their experiences. This study will follow a qualitative approach.

Fouche and Delpont (in De Vos *et al*, 2011: 65) associate qualitative research with an “unstructured approach which is appropriate to explore the nature of the problem, and this becomes the case when a researcher explores the experience of phenomena, as this study aims to do. This approach will be employed especially when testing novel aspects such as those found in the Children's Act.

Quantitative research is associated with a more formalized approach with a more definite range (Fouche and Delpont in De Vos *et al*, 2011: 63). The authoritative literature available on the

topic of the role of the mediator provides some of this framework. The opportunity to follow a quantitative approach to the topic is further strengthened by parameters set by the provisions of the Children's Act. For these reasons the study lends itself to operating somewhat within the framework provided by existing literature.

1.5.2 Research Design

This study is an exploratory and descriptive study, addressing a topic in South Africa with little or no research attached to it. The exploratory aspect of this study comes about as mediation is not a mature field in South Africa. This is balanced by the fact that social workers are mediating in terms of the Children's Act 38 of 2005 and the experience of those mediators requires description in this research.

Bless and Higson Smith (in De Vos 2011, 106) assert that exploratory research is conducted to gain insight into a situation, phenomenon, community or individual. This study is designed to achieve that in an area where social worker mediators have little foundational knowledge on mediation to rely on.

This study also describes specific details of a situation and this is consistent with Neuman's (in De Vos, 2011: 106) understanding of a descriptive approach. This study is concerned with the "how" and "why" questions Neuman (2011) refers to. These questions are tackled in some detail to describe the experience of social workers mediating in terms of the Children's Act.

1.5.3 Research Method

1.5.3.1 Literature Study

A literature study seeks to couch the research within a theoretical framework. A thorough review of literature gives the researcher a strong indication of the theories applicable in the field of study, as well as identifying gaps in the research. The literature review also gives a framework within which observations can be made and findings and enquiry can be directed (De Vos *et al*, 2011: 302).

The literature review in this study was enlightening, especially for exposing gaps in literature. Firstly, much of the literature on mediation is based on experiences outside South Africa.

Secondly, the published work on mediation, mediation methodology and mediation process is older than five years.

An exploration of the Children's Act 38 of 2005 reveals the prominence of mediation as a dispute resolution mechanism and identifies social workers as the appropriate mediators in those cases. Because of the lack of South African research and publications on the matter, social workers mediating would be required to refer to international experience to advance a theory on mediation in terms of the Act.

Early authors such as Haynes (2004) have continued to have a strong influence on the mediation field thirty or more years after publishing their work. Haynes (2004), in particular, advocated for a facilitative approach to mediation and this methodology strongly aligns with the practice and values of social work. The values of client self-determination are especially strongly underpinned in this approach.

Other approaches to mediation are more structured and directed, such as evaluative mediation. Internationally directive approaches are not recommended for family and divorce mediation, however, there is a gap in research as to whether South African social worker mediators have adopted more directive approaches than their international counterparts.

1.5.3.2 Population and sampling

This research is concerned with the experience of social work mediators mediating in terms of the Children's Act. The population is defined as the participants in the study who possess specific characteristics (De Vos *et al*, 2011: 391). For the purposes of this study the population will include social workers working in private practice, and non profit organisations, who are mediating in terms of the Children's Act 38 of 2005.

The participants included in the study were chosen from this population, consistent with the definition of Strydom (in De Vos *et al*, 2011: 392) that a sample is a "subset of measurements drawn from a population in which we are interested".

Purposive sampling involves the researcher using their judgment regarding representivity to constitute a sample (Strydom in de Vos *et al*, 2011: 392). For the purposes of this study the

researcher's judgment was informed by the parameters of the Children's Act, in which it states that the family advocate, social workers and others may mediate. The criteria for inclusion in the study was that the social worker meets the requirements of the Children's Act 38 of 2005 to mediate, and that the social worker routinely mediates as part of his/her daily tasks in private practice or at a non profit organization.

The sample was drawn by using a snowball technique in that social worker mediators were recruited and asked to identify other social workers whom they know to meet the criteria for inclusion (Strydom in De Vos *et al*, 2011: 223). The first participant was identified at a meeting of the KZN Association of Family Mediators. After she agreed to participate in the study she was asked to identify another social worker mediating who may be prepared to participate in the study. This process continued until saturation point was reached. In total the sample comprised of seventeen participants.

1.5.3.3 Data collection techniques

This study is a study with both qualitative and quantitative features. It seeks to explore and describe because of the lack of existing research in the field. However, there is literature available internationally on the topic and this international literature was used as a frame of reference for the study to compose a literature review which then was used to design a questionnaire.

The semi-structured questionnaire was made up of a mix of open-ended questions, and closed questions (De Vos *et al*, 2011: 353). The open-ended aspect of the questionnaire facilitated the exploratory aspect of the study and opened the door to new insights regarding the experience of social workers mediating in terms of the Children's Act 38 of 2005. The closed questions focused the answers around themes identified in the literature and made it possible to compare the South African experience against the international and national norms set out in the existing body of literature.

A questionnaire is a preset order of questions answered by a participant in a study. There are a number of types of questionnaires (De Vos *et al*, 2011: 186), and Delport (De Vos *et al*, 2011: 186-190) lists mailed questionnaires, telephonic questionnaires, self-administered questionnaires, questionnaires delivered by hand, and group administered questionnaires. As

well as the types of questionnaire, there are a number of formats of questionnaire to consider (de Vos *et al*, 2011: 186).

The researcher e-mailed the questionnaire to each participant, and each participant was given the opportunity to raise any queries regarding the questionnaire in a follow-up telephone call from the researcher. The questionnaire is contained in Addendum A. The individual electronic contact with each participant was aimed at ensuring a higher response rate to the questionnaire (cf Delport in de Vos *et al*, 2005: 172). Each participant then completed the questionnaire, scanned the responses and emailed the questionnaire to the researcher.

Each questionnaire was printed by the researcher and summarized in a spreadsheet, consolidating the information of the participants into a single document in order to prepare for the data analysis stage.

1.5.3.4 Data Analysis

The data was transferred into a spreadsheet by identifying key words in each response and capturing them into the spreadsheet. Once all responses were summarized in this way, the information was reviewed closely in order to identify recurring themes and patterns. The themes were compared to the themes that emerged in the literature review (De Vos *et al*, 2011: 402, 403). The comparison of themes gave a rich context for the findings of the research. The findings were presented within the themes and produced a strong framework within which to present the research results.

1.5.3.5 Data verification

It is critical that research have rules against which the trustworthiness of that research can be tested. In the language of quantitative research these include validity and reliability, while for qualitative research the researcher is concerned with the soundness and dependability of the study.

Lincoln and Guba (in De Vos *et al*, 2011: 419-421) attempt to reframe quantitative terminology in a way which is more consistent with qualitative research. In so doing they replace the terms

internal validity, external validity, reliability and objectivity with the terms credibility, transferability, dependability and conformability.

The goal of credibility is “to demonstrate the inquiry was conducted in such a manner to ensure that the subject was accurately identified and described” (De Vos *et al*, 2011: 420). In a study of the role of mediators this requirement was fulfilled by ensuring that the literature review for this study was exhaustive and adequately described the subject. The credibility was further enhanced by the addition of the descriptions of the participants in the questionnaire.

Transferability somewhat mirrors the quantitative concept of generalisability (De Vos *et al*, 2011: 420). In studies with strong qualitative elements it becomes difficult to satisfy the conditions for transferability. The way in which transferability can be somewhat achieved is through the development of strong themes in the research. This study identifies themes emerging from the data that was collected.

Dependability refers to the robustness of explanations for changes in conditions in the phenomenon chosen for study (De Vos *et al*, 2011: 421). The dependability of this study was achieved through the accurate application of the existing theory on the role of mediators mediating in terms of the Children’s Act.

Conformability is akin to objectivity (De Vos *et al*, 2011: 421). Conformability was achieved in this study in that the researcher conducted research in various different geographical and organizational settings, with participants from various cultural backgrounds.

1.5.3.6 Ethical Considerations

De Vos *et al* (2011: 311) asserts that the right of social scientists to conduct research in social settings is balanced by the responsibility to meet high ethical standards.

De Vos *et al* (2011: 311) highlights a number of critical ethical issues to consider when embarking on research. The most pressing of these is the avoidance of harm. Social scientists often have access to people who are vulnerable and avoiding harm must be especially foremost in the researcher’s mind when embarking on research. This study was cognizant of this and chose to focus on the experience of social workers, rather than clients as the focus of study.

Another issue identified by De Vos (2011: 114) is the issue of informed consent (see Addendum B). According to this principle, participants in the study must participate knowing the full extent of expectations and consequences of their participation. This study made use of a written consent form, which was explained to participants, who agreed to participate in the study and they then signed the document and mailed it to the researcher.

The formality of the initial contracting phase in this study ensured that the participants were clear on the status of the researcher, the issue of confidentiality, and the lack of compensation for participating. These are all further issues that De Vos *et al* (2011: 114) identify as potential ethical issues and these were all addressed in the Consent Form.

The research proposal for this study was scrutinized by the Stellenbosch University's Departmental Ethics Screening Committee (DESC), and approved (Addendum C). This approval implied that the study posed minimal risk to participants.

1.5.3.7 Limitations of the study

a) Population

The biggest limitation of the study is that the population is limited in number and parts of the Children's Act 38 of 2005 have not been fully implemented in practice. This factor is outside the influence of the researcher and may cause uneven experiences across different geographical sites in the country. This factor is being addressed by creating a sample derived from different geographical areas.

b) Sample size

This uncertainty impacts the sampling decisions. If the population is small, even if the sample represents a high percentage of the population, the sample may not be big enough to draw any reliable conclusions from the findings. The sample used for this study consists of 17 people across three provinces. Given the relatively low number of social workers mediating in terms of the Children's Act 38 of 2005, the sample size should result in reliable findings.

1.6 PRESENTATION

This study consists of five chapters. The first chapter serves as an introduction to the study. Chapter two sets out the theoretical and legal framework for dealing with family disputes.

Chapter three traces the role of social workers mediating in terms of the Children's Act 38 of 2005, comparing the social worker roles with the roles and expectations of mediators, as presented in existing literature. In comparing these expectations, the chapter highlights areas of overlap and conflict. Chapter four contains a presentation of the findings of the study, according to the experiences of social workers mediating in terms of the Children's Act 38 of 2005. Chapter five contains recommendations based on the findings, including recommendations for further research.

CHAPTER 2

A THEORETICAL AND LEGAL FRAMEWORK FOR DEALING WITH FAMILY DISPUTES

2.1 INTRODUCTION

Families often experience conflict that may lead to dispute. The focus of this chapter is to contribute towards meeting the first objective of this research, namely, to discuss the theoretical and legal framework for dealing with family disputes. The discussion begins with an elucidation of the concepts of conflict and dispute and applies these specifically to the family context. Having clarified these terms, the discussion will explore possible ways in which a conflict may find expression in the dispute.

Mediation is one option families have for resolving a dispute. The discussion will address what mediation means as well as identifying the common held understanding of the objectives of the mediator.

The discussion will seek to consolidate recent literature on different models for mediating. While there is broad consensus on the underlying assumptions regarding mediation there is less agreement about how a mediator should or shouldn't mediate. Modern literature seeks to address the tension in the mediation discourse.

The chapter will discuss the nature of mediation as well as situations well suited to mediation as a dispute resolution mechanism, and those situations which are not suited to mediation.

Finally, the chapter will explore what literature elucidates regarding the important topic of child participation in family and divorce mediation.

2.2 THE NATURE OF FAMILY CONFLICT AND DISPUTES

In seeking to understand the nature of family conflict the following sections examine concepts related to conflict and disputes.

2.2.1 Defining conflict

Conflict can be described as a mental struggle resulting from incompatible or opposing needs, drives, wishes, or external or internal demands. This description is consistent with Mayer's (Mayer, 2000) explanation that conflict is when one person perceives that his or her needs, desires and interest are being threatened by another. It is clear from these definitions that conflict is pervasive and can be found on various levels. Faris (2006) goes so far as to assert that conflict is a universal feature of human groups.

A model often used to understand conflict is that of Galtung (Ziyadov, 2006), who posited the concept of a conflict triangle in order to help analyse conflict. Galtung's study from the 1960s was aimed at international conflict, with the war as its main focus (Ziyadov, 2006). Over time other authors have come to appreciate its applicability to all conflict including family conflict.

According to Galtung's model, conflict has three main components: behaviour, attitudes, and confrontation (Ziyadov, 2006). The behaviour aspect relates to the mostly observable reactions to conflict. This may be shouting, violence but may also include passive aggressive type responses like silence and withdrawal. The attitude component relates to how parties in a conflict perceive each other and the conflict. This is consistent with the Conflict Resolution Network model (www.crnhq.org) which identifies a point at which opposing positions become entrenched when assumptions are made around misunderstandings and discomfort. Finally, Galtung addresses the confrontation aspect of the conflict (Ziyadov, 2006). This is often where the positions of the parties are expressed and the issues can be identified.

2.2.2 Kinds of conflict

In a family context Roberts (2008) identifies three kinds of conflict in the family. The first of these is interpersonal conflict. Roberts (2008:106) identifies this conflict as mainly residing with the adults, but as it grows children, and other family members, choose sides in the conflict. This conflict is often associated with a breakdown in communication and is characterised by mistrust, misunderstanding and hostility.

The second kind of conflict, according to Roberts (2008:106), is a conflict of interests. An example of this conflict of interests is the need in each parent to develop independence

regarding their own relationships in a post-divorce life, while maintaining a relationship with each other as co-parents of the children.

The third kind of conflict is structural conflict which operates on a social economic level (Roberts 2008:107). In this kind of conflict society places certain conflict of interest on the family as a result of norms and practices. For example, economic inequalities between sexes as well as role expectations can be a source of conflict in families.

2.2.3 Family conflict

Family conflict takes many forms and it is accepted that conflict is a normal phenomenon in family life (Haynes, 2004: 265, Lauer & Lauer, 1997: 253; Kruk). Each individual has unique experiences, ideals and values and these inevitably come into conflict with experiences, ideals and values of others. Bernard Mayer (2000: 2) defines conflict as “a belief or understanding that one’s own needs, interests, wants or values are incompatible with someone else’s”.

2.2.4 Responses to conflict

Zietlow and Sillars (in Lauer & Lauer, 1997: 319) explored the various ways that couples handle conflict. These authors identified the following styles as those employed in dealing with conflict: denial, topic management, noncommittal remarks, irreverent remarks, analytic remarks, confrontational remarks and conciliatory remarks. The study supported the hypothesis that different styles dominate depending on the stage of family life cycle in which the couple finds themselves.

It is evident that conflict can either be an opportunity for the individual to move towards meeting their potential, or it can contribute to harming the individual (Mayer, 2000: 13). The issue in families is not whether conflict exists or not, but rather how it is dealt with (Lauer & Lauer, 1997: 253).

2.2.5 Children exposed to family conflict

Studies show that children inappropriately exposed to conflict are adversely affected (Kelly & Emery in Bagshaw et al, 2006: 19). Bagshaw et al (2006: 20) strongly assert that children

experiencing the divorce of their parents are most affected when conflict has been a feature of their parents' behaviour both during marriage and following divorce. This assertion is supported by numerous authors (Emery, 2005; Johnson, 2005; Kelly & Emery in Bagshaw *et al*, 2006:20). The implication here is that if the best interests of children are to be served, children must be protected from unresolved conflict as much as possible. Mediation is suggested as a tool to accomplish this end (Emery, 2005).

2.2.6 Defining disputes

Roberts (2008:108) defines a dispute as a sense of grievance over a specific issue, which is communicated as a contested claim to the person regarded as responsible or blameworthy. An alternative definition defines a dispute as to engage in argument. It is clear, then, that the dispute involves the articulation of the disputed issues by the aggrieved people and presenting of this argument to the offending person (Roberts, 2008).

To dispute is to focus on some issue that may have been causing conflict into a particular argument which is often based on the broader underlying conflict. At the point where conflict finds expression in an argument, it becomes a dispute (Roberts 2008).

The elements of Roberts's (2008) formulation infer that the person is able to organise and name a particular grievance in the conflict issue. Once this grievance is named a certain argument is articulated around the issue and blame is apportioned to someone else as the cause of the conflict.

2.2.7 Family disputes

Caplan (in Roberts, 2008:108-109) identifies certain areas as common sources of dispute. This list includes material goods, issues around decision-making, social relations, existential predicaments, ways of grouping people, and the need to highlight important differences.

In separation and divorce the disputed areas can include all of Caplan's sources and are often centred around issues of responsibilities and rights of parents (Roberts, 2008; Parkinson, 1997), that is, guardianship, care, contact and maintenance issues. These areas often give the context within which arguments are articulated and where a family conflict has found expression.

The following section will examine how mediation can serve as a dispute resolution strategy.

2.3 MEDIATION AS A DISPUTE RESOLUTION STRATEGY

2.3.1 Dispute resolution mechanisms

Authors (Mayer, 2000; Parkinson, 2000) are of the opinion that the context of conflict plays a large part in determining the appropriate mechanisms for resolving conflict. Mayer (2000: 7) points out that the historical context is very important to understand the conflict and understanding the emotions involved in the conflict can help resolve the conflict constructively.

Parkinson (2000: 71-72), too, recognizes the place for a systems approach to resolving conflict. This broader understanding of the conflict can help match the conflict with an appropriate mechanism for resolving the conflict.

The legal profession has developed a framework for resolving disputes. The commonly used mechanism is litigation, but dispute resolution extends to 'alternative dispute resolution'. This term is used to refer to mediation, arbitration and other settlement mechanisms outside the usual court processes.

Mediation can be defined as 'managing other people's negotiation' (Haynes, 2004:15). The individuals involved in the conflict are the primary agents in negotiations and the agreement is the product of their own work towards a resolution. It is widely asserted that mediation is best suited to situations where the people in conflict with each other need to preserve some sort of relationship into the future and where finding a solution promptly is important (Brand, 2009).

2.3.2 Dispute resolution in separation and divorce

Divorce matters follow the litigation process in that it is adversarial and requires a plaintiff issuing summons, and a defendant. The psycho-social effects of this adversarial process are numerous and constitute a significant stressor for those involved in the process and this has led to extensive research literature on the matter (Holmes & Rahe in Parkinson 2000: 70).

2.3.2.1 *The adults*

For adults in the process of divorce the ways in which they dealt with conflict as a couple are intensified in the adversarial process (Parkinson 2000: 70). The power dynamics within their relationship and the mechanisms each developed to deal with their relationship are sharpened. In divorce each party is confronted by their dispute resolution strategies and in the process may be revisiting the very reason why they are getting divorced in the first place.

2.3.2.2 *The children*

In the light of the conflict in the home and the various practical implications of the divorce, children are affected by separation and divorce. The challenges for a child experiencing the divorce of his/her parents are well-documented, and include understanding the divorce, strategic withdrawal, dealing with loss, dealing with anger, working out guilt, accepting the permanence of the divorce and taking risks in love (FAMAC, 2009: 77).

The study by Bagshaw *et al* (2006) challenge the view that divorce and separation is inevitably harmful to children. While accepting that there are certain risk factors to children, they assert that the majority of children from divorced families are well adjusted and meet their life goals (Bagshaw, 2006: 19). The study supports the notion that the way in which conflict is dealt with can determine the effects on those involved in the conflict.

2.4 TRACING THE PATH FROM CONFLICT TO DISPUTE

The Conflict Resolution Network (www.crnhq.org) has documented the process from conflict to dispute. The assertion made is that the crisis did not start with the dispute, but rather that this has developed over time. This is also the opinion of Falk Moore (Roberts, 2008) who recognises that disputes may be affected even by historic conflict that seems to have been resolved.

Felstiner *et al* (Roberts, 2008) have identified that experiences of conflict escalates from identifying the conflict, to blaming the perceived cause of the conflict, to asserting one's perceived rights. This points to the fact that the dispute could be regarded as the tip of the iceberg in terms of the experience of conflicts of the family. Emery, Sbarra and Grover (2005) expand on this notion in stating that negotiating in a dispute is as much a psychological issue as it is a legal issue. The informal setting of mediation allows space for exploration of broader solution which may be more likely to lead to satisfactory solutions than a court order.

The following section offers a discussion of a legal framework for parental responsibilities and rights in cases of divorce and separation.

2.5 LEGAL FRAMEWORK FOR PARENTAL RESPONSIBILITIES AND RIGHTS IN CASES OF DIVORCE AND SEPARATION

The Children's Act represents an attempt to bring all law involving children under one piece of legislation (Skelton, 2008). This was a mammoth task that began in 1997 and culminated in the Children's Act 38 of 2005 (Skelton, 2009). The implementation of the Act occurred in parts with the definitions and a number of sections being promulgated in July 2007, and the full Act being promulgated as the Children's Amendment Act on 1 April 2010 (Republic of South Africa, 2007).

The promulgation of certain sections of the Children's Act in July 2007 signified the changing of certain definitions and meanings (Skelton, 2008). A significant change was the replacement of "custody" and "access" with "care" and "contact". Skelton (2008) points out that the change in terminology was more than a cosmetic change and that it signalled a shift from parental power to parental responsibilities and rights for children. Under the Children's Act, the child has the right to care from the parent, while the parent has the responsibility and right to care for the child (Skelton 2008). This is in contrast to the parent's right to custody, or a right to access under the Child Care Act.

It is worth noting that in the previous legal framework in the Child Care Act 74 of 1983 and Divorce Act and Mediation Act 70 of 1979, the typical outcome of a divorce process was for custody of a child/children to be granted to one parent or the other (Cronje & Barnard, 1994). Typically, the non-custodial parent had a right to access and his access arrangements would be defined in the divorce order. Custody related to a parent's right to make day-to-day decisions regarding the child and in most matters, this right rested with one parent, and normally the mother (Cronje & Barnard, 1994).

The definition of "care" in the Children's Act 38 of 2005 goes beyond the understanding of custody in the previous legal framework (Skelton, 2008). The definition of care extends as wide as including the responsibility to provide a suitable place to live, safeguarding and promoting

the well-being of the child, to accommodating any special needs of the child, disciplining the child humanely, and always acting in the child's best interests.

Contact with the child in terms of the Children's Act relates primarily to maintaining a personal relationship with the child (Skelton, 2008). The definition makes provision for contact with the child living with someone else and insists that contact means visiting the child or being visited by the child and communicating with the child by post, telephone or other form of electronic communication.

The new emphasis in the Children's Act assumes a high level of cooperation between parents. The foundations of the requirement that parents work together in the interests of the children are laid in the articulation of the parental responsibilities and rights.

2.5.1 Parental responsibilities and rights

The shift from parental power to parental responsibilities and rights is encapsulated in section 18 of the Children's Act 38 of 2005 (Republic of South Africa, 2010). According to section 18 of the Act, parental responsibilities and rights, include: care for the child, contact with the child, guardianship of the child, maintenance of the child (Skelton, 2008; Republic of South Africa, 2010).

Skelton (2008) points out that section 18 does not limit the number of holders of parental responsibilities and rights to parents. The change in terminology from *parental* to *holders* of parental responsibilities and rights is not accidental. The implication is that the holders of responsibilities and rights may not necessarily be the parents of the child (Skelton, 2008). Further, section 18 of the Children's Act indicates that a holder of parental responsibilities and rights may either have full or specific parental responsibilities and rights in respect of a child. When a person has specific responsibilities and rights that person, he/she has responsibilities and rights regarding a particular element of the full responsibilities and rights (Skelton 2008).

According to Cronjé (in Cronje & Barnard, 1994), under the Child Care Act 74 of 1983 parental power was acquired in the following ways: by the birth of a child from a valid marriage, the birth of an extramarital child, legitimization of an extramarital child, and adoption.

Where a child was born "out of wedlock", the child fell under the parental power of his or her mother (Cronje & Barnard, 1994). The father of this child could acquire parental power in the event of the child being "legitimated" by the subsequent marriage of the parents to each other. Furthermore, the parental power over the child did not act retrospectively; it came into power from the date of marriage. This aspect changed with the coming into force of the Children's Act, as unmarried fathers no longer had to make a court application in order for the rights and responsibilities to accrue. Furthermore, the rights and responsibilities act retrospectively.

2.5.2 Holders of parental rights and responsibilities in terms of the Children's Act 38 of 2005

Section 19 to 24 of the Children's Act illustrates the shift in modern law away from the position of the Child Care Act, and deals with how parental responsibilities and rights might be attained.

Section 19 of the Children's Act deals with the parental responsibilities and rights of mothers (Republic of South Africa, 2007). A mother over the age of eighteen has full parental responsibilities and rights in respect of a child. Where the mother is a minor and the father does not have guardianship in respect of the child, the maternal grandmother of the child acquires parental responsibilities and rights.

Section 20 of the Children's Act relates to parental responsibilities and rights of married fathers (Republic of South Africa, 2007). The biological father of the child has full responsibilities and rights in respect the child where he is married to the child's mother, was married to the child's mother at the time of conception, birth or any time between conception and birth.

Section 21 of the Children's Act represents a significant shift for unmarried fathers (Skelton, 2008). The section deals with parental responsibilities and rights for unmarried fathers, and lays out in some detail the conditions under which an unmarried father may acquire full responsibilities and rights. These conditions are laid out as a kind of four-part test. The first part of the test deals with whether the unmarried father was living with the mother in a permanent life partnership at the time of the child's birth. In this case, the unmarried father will acquire full responsibilities and rights (Republic of South Africa, 2007).

In the event that the unmarried father was not living with the mother in a permanent life partnership at the time of the child's birth, a further test can be applied in terms of section 21. If the unmarried father 1) consents to be identified as the child's father and contributes, and 2) contributes or attempts to contribute to the child's upbringing for a reasonable period, and 3) contributes or attempts to contribute towards expenses connected with the maintenance of the child, the unmarried father acquires full responsibilities and rights.

Before the implementation of the Children's Act, fathers of children born outside the context of marriage had recourse to the High Court to apply for custody and/or access (Cronje & Barnard, 1994). The Natural Fathers Of Children Born Out Of Wedlock Act gave the court the competence to grant these powers on application of the unmarried father (Skelton, 2008; Cronje & Barnard, 1994). The granting of those rights and responsibilities was not automatic, but required an order of court. The Children's Act 38 of 2005 repealed the Natural Fathers Born Out Of Wedlock Act and has made automatic the granting of parental responsibilities and rights to unmarried fathers who meet the section 21 criteria.

Section 22 of the Children's Act makes provision for a holder of parental responsibilities and rights to enter into a Parental Responsibility And Rights Agreement with the biological father of the child (if he does not qualify in terms of section 20 or 21) or any other person having an interest in the care and well-being of the child. A Parental Responsibilities And Rights Agreement must meet the formalities set out in the Act and can be registered with the Office Of The Family Advocate or made an order of the High Court. Only the High Court may confirm, amend or terminate parental responsibilities and rights agreements.

Skelton (2008) points out that possible holders of parental responsibilities and rights in terms of section 22 can be from a broad spectrum. Parental responsibilities and rights may be shared with family members, or extended family members, new permanent life partners of parents, grandparents, uncles, and so on. However, parental responsibilities and rights may also be shared with non-family members (Skelton, 2008). Sharing these parental responsibilities and rights does not mean that the existing co-holders of parental responsibilities and rights have given away any of the parental responsibilities and rights, these are shared rather than surrendered.

While section 22 of the Children's Act 38 of 2005 (Republic of South Africa, 2007) makes provision for holders of parental responsibilities and rights to share these responsibilities and rights with another person voluntarily, section 23 makes provision for a court to assign parental responsibilities and rights, specifically contact and care to an interested person. The interested person may apply to the High Court, a Divorce Court, or the Children's Court for such an order. Section 23 lays out considerations for the court in making such a decision, it also stipulates that by granting care or contact responsibilities and rights to an interested person, the parental responsibilities and rights of the existing holder will not be affected. Effectively more than two people may hold parental responsibilities and rights in respect of a particular child (Skelton, 2008).

Section 24 of the Children's Act 38 of 2005 (Republic of South Africa, 2007) asserts that an interested person may apply to the High Court for guardianship in respect of a child. This section requires that the court take into account the best interests of the child, the relationship between the applicant and the child, and any other fact that the court deems relevant. The applicant is required to explain why it is that the existing guardian of the child is not deemed suitable to have guardianship in respect of the child (Skelton, 2008; Republic of South Africa, 2010).

2.5.3 Best interests of the child

Section 7 of the Children's Act is novel in the sense that it codifies what is in the child's best interests (Skelton, 2008). While the Child Care Act contained a provision that in all matters regarding a child the child's best interest is paramount, Skelton (2008) points out that the content and scope of that standard was problematic. The provision that the child's best interests are paramount open the debate as to what that meant and differed from case to case. In the 1994 case of *McCall vs. McCall* a list was given in which the best interests of the child was codified by the judge. The list is not open-ended and therefore aims to give some clarity on the definition of the best interests of the child. Section 9 of the Children's Act 38 of 2005 (Republic of South Africa, 2007) stipulates that in all matters regarding the care, protection and well-being of the child that this standard should be employed. This calibrates, in very certain terms, the framework of the solution for any family dispute involving children.

2.5.4 Access to court

Section 14 of the Children's Act 38 of 2005 (Republic of South Africa, 2007) asserts that every child has the right to be assisted in bringing a matter to court, as long as that matter falls within the jurisdiction of the court. Skelton (2008), Carnelley (2010) and Mahlobogwane (2010) point out that this section is bringing legislation in line with the Constitution of the Republic of South Africa (1996), in particular section 28 of the Constitution. Skelton (2008) points out that the section makes it possible for a child to apply directly to the legal aid board for a legal representative.

Examples of this are a couple of journal articles that have appeared in the Journal for South African law (Carnelley, 2010; Mahlobogwane, 2010). The first case in point is an article written by Carnelley (2010) in which she seeks to establish the rights of children to receive funding for legal representation at court. The point of departure is section 10 of the Children's Act, which she links to section 28 of the Constitution (Carnelley, 2010). It is possible that in this journal article Carnelley (2010) intends to take an obtuse angle in tackling the issue of legal representation of children. However, in the whole journal article, published in 2010, there is no mention made of section 14 of the Children's Act, which in simple terms lays out the child's right to legal representation (Skelton, 2008; Republic of South Africa, 2010). A deeper understanding of the Children's Act 38 of 2005 may have led to a more succinct, stronger argument for legal representation of children, and the need for Legal Aid to sponsor that legal representation.

2.6 CHILD PARTICIPATION

2.6.1 Child participation in mediation

Mediation is involved with helping negotiations between two people (Haynes, 1994). In divorce matters these people tend to be the divorcing parties who are often parents of children (James *et al.*, 2010 ; Hetherington, Stanley-Hagan, 1999). Recent developments in international law have raised the issue of child participation in mediation (James *et al.*, 2010). The nature of divorce and family mediation where children are affected is that the best interests of the child are considered (Republic of South Africa, 2007). The dilemma is created as to whether to involve the child in the mediation process or not (Republic of South Africa, 2007; De Jong,

2008; Bagshaw *et al.*, 2006). If the answer to this dilemma is that the child must participate a further conundrum is created as to how and when in the process the child must participate.

The issue of child participation has gained prominence since the United Nations Convention on the Rights Of The Child of 1989 (James *et al.*, 2010; De Jong, 2008). According to this convention in matters regarding children, firstly, the best interests of the children must be held as paramount (article 3), and secondly, a child must be allowed to participate in decision making regarding the future of the child, according to the child's age, maturity, and stage of development (article 12).

James *et al* (2010) were particularly interested in this question. The researchers sought to compare the application of the United Nations Convention in England and Norway. One of the motivations of these studies was precisely that mediation was being used more and more in both countries and they wondered how the provision for children to participate in the decision-making was incorporated into the mediation process in the different countries (James *et al.*, 2010). An important distinction between the two countries is that England is not a signatory to the convention, whereas Norway is. The English position is that the convention is broadly adhered to in that country's domestic law (James *et al.*, 2010). Norway has incorporated the entire convention into their domestic law (James *et al.*, 2010).

The authors make a strong finding that the decision to involve children in the mediation process tends to rest with adults, and often with the mediator (James *et al.*, 2010) . In other words, despite the absolute provision that children must participate in decision-making regarding their own future, according to their age, stage of development and maturity, this is not happening in most cases. Even in Norway where the entire Convention has been incorporated into law, and where the law insists that children from the age of seven must participate, the children do not participate in most cases. For example, 62% of cases in mediation settle at the first one hour session (James *et al.*, 2010). There is no provision to see the children in that first hour and therefore children are not participating in the decision-making. The statistics in England are similar, with around 60% of divorce cases settling at First Hearing, again without the participation of children (James *et al.*, 2010).

De Jong (2008) has applied herself to trying to answer some of these questions for the South African context. She notes that South Africa ratified the United Nations Convention on the

Rights Of The Child in 1995. And therefore it is expected that South Africa follows that Convention, including articles 3 and article 12 (James *et al.*, 2010; De Jong, 2008). De Jong (2008) makes the assertion that mediation is an appropriate forum for children to participate as it does not have the adversarial nature of litigation. De Jong (2008) concurs with Bagshaw *et al.* (2006), Emery, Sbarra & Grover (2005), James *et al.* (2010), Hetherington, Stanley-Hagan, (1999), Holtzworth-Munroe *et al.* (2011), Jenkins & Buccioni (2000), Mantle & Critchley (2004), and Parkinson (2000) that children should be protected from unresolved conflict and it is in exposure to conflict that real harm may be done. The compelling reasons for the child participation in the mediation process are balanced by reasons why a child should not participate and De Jong (2008) gives a useful breakdown of the variables that she considers important. She considers the following conditions as being conducive to including a child in the mediation process:

- where the child has requested to be included;
- when the parents indicate that the child has a strong opinion regarding time-sharing;
- where child refuses to spend time with one or other of the parents;
- where child is battling to come to terms with the change in circumstances;
- where there has been alienation of the child from one or other of the parents;
- where parents lack insight into the destructive effects of open conflict;
- where clarification is required between parent and child;
- where there is an apparent problem in the relationship between parent and child and where this indicates intervention from a mediator.

De Jong (2008) identifies the following circumstances which should indicate that the inclusion of the child is not appropriate:

- when the parents sign agreements regarding the plan;
- when parents agree on a plan that is not age-appropriate;
- where either of the parents is opposed to including the child;
- where the child has strong misgivings regarding participation;
- where the child is being unduly influenced by a parent;
- where there is a history of abuse;
- where it is apparent that the parents will not take the children's opinion into consideration;
- where the parents do not have the problem-solving capacity to agree on a plan;

- where the emotional climate of the parents means that the parents are unable to agree on any plan;
- where the parents have a psychological disorder;
- where either the parents has a drug or alcohol dependency problem.

It is apparent from this that even though De Jong (2008) points out that South Africa has adopted the United Nations Convention on the Rights of The Child of 1989, her own opinion is that a child's participation is not always in the child's best interests.

The wording of the United Nations Convention on the Rights of The Child of 1989 indicates that the child should participate according to their age, stage of development and maturity (article 12). It is therefore logical that reasons why a child would not participate in the decision-making would have to do with the child being too young, at a sensitive stage of development, or too immature to participate. This raises a new set of questions as to what a suitable age for participation would be. Hetherington et al (1999) have dealt with this in their article, however the findings of that article are that, while mediation has been shown to be beneficial to children, the decision regarding an appropriate age for participation must be made on a case by case basis, concurring with Jenkins (Jenkins, Buccioni, 2000) and De Jong (2008). This differs from the outcome of the Norway deliberations on the matter, where it is law that every child from the age of seven *must* participate in decision-making, and children younger than that *may* participate in decision-making regarding the future of the child (James et al., 2010).

Researchers (James et al., 2010; De Jong, 2008; Jenkins, Buccioni, 2000) concur on the importance of the mediator in making that decision. De Jong (2008) herself flags the importance of mediators having knowledge of children and child development before engaging in family and divorce mediation due to the importance of the decisions to be made around the mediation process. This idea is supported by other researchers (James et al., 2010; Hetherington & Stanley-Hagan, 1999; Holtzworth-Munroe, 2011).

Section 10 of the Children's Act (Republic of South Africa, 2007) is explicit in that the child must participate in matters concerning themselves. However, the qualification "appropriate age, maturity, and stage of development" (Republic of South Africa, 2007) leaves the issue of child participation open ended. Furthermore, international practice regarding implementation of the

United Nations Convention on Rights of The Child of 1989, on which the section is based, has been ambivalent: even though children must participate, most often they do not participate (James et al., 2010). The flaunting of the United Nations Convention on rights of the child, together with the absolute provision for a child to participate in section 10, creates a dilemma for the mediator as to when and how to allow children to participate (De Jong, 2008).

The contradiction deepens with section 31 of the Children's Act 38 of 2005 (Republic of South Africa, 2007), where children are required to participate in matters regarding care and contact, but where no sanction exists if they are not allowed to participate (O'Gorman, 2012). The door is left open for children to be left out of the process, despite the strong wording in the United Nations Convention on the Rights of the Child, the Children's Act, and regulations.

Another example is by Mahlobogwane (2010) who grapples with the idea of child participation. The author still uses the word custody, instead of care, throughout his argument and fails to mention mediation as a possible forum for resolving family disputes. He therefore only gives cognizance to the court environment as a means of resolving family disputes. The Children's Act 38 of 2005 itself prefers settlement out of court and has given effect to mechanisms in order to accomplish this.

No doubt, over time these inconsistencies will be ironed out and the discussions around the Children's Act 38 of 2005 will be more focused and to the point. In the meantime, a mediator mediating in terms of the Children's Act must sift through the knowledge available and assess to what extent it reflects old understanding and meanings versus the intentions of the Children's Act and, indeed, the international movements in family law.

2.6.2 Child participation in decisions regarding themselves

Section 10 of the Children's Act (Republic of South Africa, 2007) gives expression to article 12 of the United Nations Convention on the Rights of the Child of 1989 that the child must participate in any matter concerning the child.

Skelton (2008) asserts strongly that because of this short section it is *obligatory* to give due consideration to the views expressed by the child in any matter concerning him/herself. The regulations of the Children's Act (Regulation 11) indicate that children participate, at least, by

having an opportunity to express their opinion before a parenting plan is finalised, and then they are informed of the contents of the plan after it has been finalised.

In summary, there is strong international corroboration of the view that children must participate in decisions regarding their future (James et al., 2010; De Jong, 2008). This becomes especially relevant in countries that have ratified the United Nations Convention on the rights of the child. However, even in countries where this convention has been ratified, it is unclear as to how this is routinely incorporated into the mediation process. The decision is laid upon the mediator, and must at least contain a consideration of a child's age, stage of development, and maturity.

2.7 CO-EXERCISING PARENTAL RESPONSIBILITIES AND RIGHTS.

It is clear that the innovations of the new Children's Act so far create a situation of broader participation in family life than under the Child Care Act (Skelton, 2008; Cronje & Barnard, 1994). Section 30 to 34 of the Children's Act 38 of 2005 gives itself to helping co-holders of parental responsibilities understand how they might exercise these responsibilities and rights in this context.

Section 30 of the Children's Act 38 of 2005 (Republic of South Africa, 2007) explains how co-holders of parental responsibilities and rights may act independently of the other co-holders of parental responsibilities and rights. At the same time a holder of parental responsibilities and rights may agree that a co-holder of parental responsibilities and rights exercises some of these on his or her behalf. This is not seen as a surrendering of responsibilities and rights.

Section 31 of the Children's Act 38 of 2005 (Republic of South Africa, 2007) reiterates that a child must participate in decisions involving the child. Section 31 (Republic of South Africa, 2007) admonishes holders of parental responsibilities and rights to give due consideration to views and wishes expressed by a child before making a decision involving the child. This section is explicit in that it identifies issues around guardianship, care, contact, or where there is likely to be a significant change in the child's living conditions, education, health, personal relations with the parent, or the child's wellbeing.

2.7.1 Contents of parenting plan

Section 33 of the Children's Act (Republic of South Africa, 2007) provides co-holders of parental responsibilities and rights with the tools to exercise those responsibilities and rights more smoothly. Section 33 allows co-holders of parental responsibilities and rights to enter into a parenting plan voluntarily. It goes further in requiring that co-holders of parental responsibilities enter into a parenting plan where they are having difficulty exercising their respective parental responsibilities and rights. The section of the Act articulates what might be included in a parenting plan and identifies that any matter in connection with parental responsibilities and rights may be included. Section 34 sets out the formalities regarding the parenting plan (Republic of South Africa, 2010).

2.7.2 Disputes requiring mediation in terms of the Children's Act

The Children's Act keeps pace with international trends in the attempt to settle family matters outside the court environment (Skelton, 2008; Sloth-Nielsen & Du Toit, 2008). The Children's Act especially values mediation as a conflict resolution tool and in a number of sections makes referral to mediation obligatory (Skelton, 2008; De Jong, 2008).

Section 21 of the Children's Act deals with unmarried fathers as holders of parental responsibilities and rights (Republic of South Africa, 2010). Section 21 contains a four-part test to ascertain whether such a father attains automatic responsibilities and rights. This section of the Act makes it obligatory that the matter be referred to mediation in the event of a dispute around whether a father acquires these parental responsibilities and rights (Republic of South Africa, 2010). The mediation process would seek to apply the test contained in section 21.

Section 33 (Republic of South Africa, 2007) which deals with parenting plans, makes mediation an option in certain situations. It points out that where the co-holders of parental responsibilities and rights are experiencing difficulties in exercising their responsibilities and rights they must either seek assistance from the Family Advocate, social worker or psychologist, or mediation through a social worker or other suitably qualified person.

The content of mediated parenting plans in terms of section 33 could cover any matter that falls within parental responsibilities and rights, that is, care, contact, maintenance, guardianship

(Republic of South Africa, 2007). Provisions for care issues that might be considered include primary residence, health decisions, education decisions, religious and cultural upbringing (Republic of South Africa, 2010). When considering contact the principles of section 7 are employed and a contact plan should consider all significant people to the child.

Chapter 4 of the Children's Act gives itself to addressing the issue of Children's Courts (Republic of South Africa, 2007). Section 46 lays out the orders Children's Court may make. One of these orders is for the parties to the family dispute to participate in mediation. Section 71 of the Act confirms this, and further supports it by allowing the courts to make a settlement arrived at out of court an order of court.

2.8 CONCLUSION

An understanding of the mediation process requires an understanding of conflict, disputes, negotiation. This chapter has explored each of those topics in order to better understand mediating in family and divorce matters. The discussion concluded with a brief look at child participation and the problem that this creates in the mediation process. The way that legislators in various countries have resolved this problem is by requiring that the mediator make the decision regarding child participation in the mediation process. The chapter illustrated how this decision by the mediator is impacted by the United Nations Convention on the Rights of the Child. The next chapter will address the myriad of issues the social worker must consider when mediating.

CHAPTER 3

THE ROLE OF SOCIAL WORKERS MEDIATING FAMILY DISPUTES IN TERMS OF THE CHILDREN'S ACT 38 OF 2005

3.1 INTRODUCTION

This chapter will explore factors which come into play for social workers mediating. The second objective of this thesis seeks to explain the role of social workers mediating family disputes with particular reference to the implications of the Children's Act 38 of 2005. This chapter will begin by exploring the social work contexts that social workers find themselves in in South Africa. It will explore the scope of practice of the social worker as well as the code of ethics articulated in South Africa. The social worker is required to balance this social work code of ethics with a mediator's code of ethics and this chapter will explore each of these.

Literature (Folb, 1993; Kruk, 1997; Roberts, 2008) points to the challenge social workers face in differentiating traditional social work practice from work as a mediator. This chapter will discuss the delineation between a traditional social worker role and the role of a social worker mediator. The chapter will also give attention to delineating the role of the social worker from the work of other professionals in the mediation field, such as attorneys.

The social worker has at his/her disposal a broad spectrum of models and methodologies to employ (Kruk, 1997). This chapter will investigate models for the practice of mediation with special emphasis on the mediation process.

Finally, the chapter will explore the social worker mediator's role where an allegation of domestic violence is made. The response of a social worker mediator differs from that of a social worker in different settings and this issue highlights the uniqueness of social work practice as a mediator.

3.2 SCOPE OF PRACTICE FOR SOCIAL WORKERS IN SOUTH AFRICA

There are currently in the vicinity of 17,000 social workers in South Africa (www.sacssp.co.za). The majority of the social workers work in government institutions and the balance work in non-government organisations and in the private sector.

The South African Council for Social Service Professions has produced a document setting out the scope of practice for social workers (https://www.sacssp.co.za/content/documents/sw_scope_of_practice.pdf). According to the document, specializations are currently under review. At the same time, social workers may perform eco-metric testing, case management, casework, group work, community work, social work administration, and social work research. The document was created in order to distinguish social workers from social auxiliary workers. Social workers mediating in terms of the Children's Act 38 of 2005 are likely to find themselves having to integrate mediation work into traditional social work settings, and will have to make decisions as to where mediation fits best in practice.

3.3.1 Eco-metric testing

Ecometric testing refers the social workers role to perform assessments in order to deliver an accountable helping process.

3.3.2 Case management

Case management by social workers seeks to help people by aiding them in developing goals, to use services effectively, developing new services, and by advocating on behalf of clients.

3.3.3 Casework

Casework refers to face-to-face interventions with individuals, couples or families. The SACSSP reinforces the advocacy elements of this intervention.

3.3.4 Group work

Group work by a social worker refers to work with a non-therapeutic group of people with a common reason to bring them together.

3.3.5 Community work

Community work is a broad reference to social workers organising and helping to develop communities.

3.3.6 Social work administration

Social work administration is considered by the SACSSP as a support function to organisation and the staff. It is seen as a means by which the organisation might meet its goals.

3.3.7 Social work research

Social work research refers to the social worker's ability to make scientific enquiry about a social problem in order to increase the body of knowledge of the social work profession.

3.3.8 Social worker specialisations

SACSSP has identified certain specialisations in social work. These are adoption social work, occupational social work, and probation work. Each of these requires special registration and have particular requirements for maintaining registration.

The scope of social work practice sets the parameters within which the practice of mediation by the social worker will need to find a home. The social worker must resolve this while being mindful of his/her ethical responsibilities.

3.4 SOCIAL WORKER CODE OF ETHICS

The code of ethics for South African social service professionals, which is currently under review (www.sacssp.co.za) is divided into six sections, each dealing with a different aspect of the professional life of a social worker. These areas are behaviour towards social service professions, clients, colleagues and other professionals, the employer, social service institutions, and the community.

3.4.1 Social service professions

The duty to the social service professions revolves mainly around maintaining the standards of the profession. A social service professional is required to invest in the profession the evaluation and the constant maintenance of high standards.

3.4.2 Clients

The code of ethics regarding behaviour towards the client has seven parts. The notable aspects in respect of our discussion are the recognition of the uniqueness of the client, the acknowledgement of the self-determination of clients, the voluntariness of the process, the importance of confidentiality, and the provision that social service professionals may not turn down offering any service on the basis of non-payment.

3.4.3 Colleagues

The duties to colleagues include respect and trust between colleagues and the promotion of other colleagues and the profession to the sharing of knowledge and information.

3.4.4 Employer and other institutions

A social service professional is required to respect the authority of the employer, other social service institutions, and the broader community.

The social worker mediating is first a social service professional and then a mediator, so it is critical for the social worker to bear in mind the professional and ethical standards set by the profession. A social worker mediating in South Africa has the added consideration of mediation norms and ethics. The next section will explore some mediator code of ethics that are considered at the core of mediation practice.

3.5. MEDIATOR CODE OF ETHICS

While the mediator is dictated to by social work ethics, the mediation field also has well-articulated guidelines for the ethical practice of mediation (Kruk, 1997; Roberts, 2008; Mantle & Critchley, 2004). In South Africa there is no statutory body governing the ethical conduct of mediators. Mediation falls under the control of the respective professional bodies. Social workers are expected to adhere to the code of ethics for social workers as discussed in the previous section. However, the need for a specific set of codes of ethics for mediators has been recognised internationally. Hoffman (2000) has usefully articulated 10 principles of mediation ethics which provide a useful starting point. In South Africa a voluntary association called the National Accreditation Board for Family Mediators (NABFAM) has articulated a code of conduct for its members in order to meet the need to provide a code of ethics for mediators to South African mediators.

3.5.1 American norms

Hoffman (2004) compares the codes of ethics for the Society of Professionals in Dispute Resolution, the Academy of Family Mediators, and the American Bar Association and others in order to try to extrapolate commonalities between codes of ethics. The 10 principles he identified were: addressing conflict of interest, maintaining professional boundaries, the impartiality of the mediator, the voluntariness of the process, the importance of confidentiality,

the "do no harm" principle, the self-determination of the parties, the empowerment of the parties by ensuring informed consent, consideration of third parties' interests, and the importance of honesty.

3.5.2 South African norms

Up until relatively recently, no standardised norms for mediators existed in South Africa. With the adjustments of the Children's Act 38 of 2005 mediators became increasingly aware of the need to draw up norms (De Jong, 2005). Groups of mediators from each province worked together (<http://nabfam.co.za/>) to try to articulate norms for mediators that would respect international norms while meeting the specific requirements of mediating in South Africa. The organisation that was formed refers to itself as the National Accreditation Board of Family Mediators (NABFAM). The members of this organisation include the Family Mediators Association of the Cape, the South African Association of Mediators, the KwaZulu Natal Association of Family Mediators, and Family Life South Africa (<http://nabfam.co.za/>).

3.5.3 Similarities between NABFAM and international norms

In articulating national standards for South African mediators, NABFAM also identifies conflicts of interest, impartiality, and confidentiality as being vital to the ethical backdrop to mediation.

On top of these aspects, NABFAM has considerations for diligence/competence to mediate. According to NABFAM a mediator should have an appreciation of the line between their competence and areas outside their skill set.

NABFAM (<http://nabfam.co.za/>) also considers the place of fees in the ethical considerations. The guidelines make it clear that the fee structure should be transparent and communicated in advance of the process. The guidelines overtly consider it acceptable for a mediator to charge fees for the mediation service.

The ethics of social work as stipulated in the code of ethics and mediation are strongly congruent. It is clear that the values of clients empowerment and self-determination in social work runs strongly through the field of mediation and a social worker mediating is likely to feel comfortable with these aspects of mediation.

A closer look at the emphasis of South African Council for Social Service Professionals on the scope of work of a social worker indicates a potential problem for a social worker mediating. It is obvious that the view of the SACSSP is that a social worker is a strong advocate on behalf of the client, especially where the client is considered vulnerable. This is juxtaposed with the important principle in mediation that the mediator be objective and unbiased (<http://nabfam.co.za/>).

Another area of strong overlap is the issue of confidentiality. Again, closer scrutiny of this principle produces challenges for a social worker mediating (<http://nabfam.co.za/>). Notetaking and reporting is considered an important part of social work professionalism. A social worker's accountability relies strongly on casenotes and supervision. In the field of mediation it is not the norm for process notes to be kept, and if any notes are kept the permission of clients is requested and the notes are destroyed at the end of the process. Documentation relating to the mediation process is limited to the agreement to mediate, the client details, and the outcome of the mediation process (either an agreement, or a certificate of outcome by the mediator). The concept of destroying process notes jars with professional social work practice.

3.6 THE NATURE OF MEDIATION IN DISPUTE RESOLUTION

The following section is concerned with presenting definitions of mediation and negotiation and explaining the nature of mediation in conflict resolution.

3.6.1 Defining mediation

Mediation can be defined as the management of other people's negotiations (Haynes, 1994:1). What is meant by the term "management" opens the debate about what mediators actually do in the process (Folb, 1993). Folberg, Milne and Salem (2004) have noted that Haynes (1994) and other pioneers of family mediation had a particular process focus in the understanding of mediation. Later authors have developed a more goal focused approach to mediation and these mediators have a different understanding of what it means to manage the process (Folberg, Milne & Salem, 2004).

3.6.2 Defining negotiation

Roberts (2008) makes a strong point in emphasising the importance of a good understanding of negotiation in understanding mediation and the role of the mediator. Negotiation is the process by which the disputing people seek to reach settlement (Fisher & Shapiro, 2007).

Various authors (Roberts, 2008; Haynes, 1994; Folberg, Milne & Salem, 2004; Fisher & Shapiro, 2007; Parkinson, 1983; Robinson & Parkinson, 1985; Irving & Benjamin, 2002) identified that at the heart of conflict resolution lies the ability to move from the point of competing positions to exploring areas of compatibility of interest, or principle. Bargaining is incompatible in a family setting as bargaining on issues regarding children treat children as inanimate objects and fall short of what is expected under the law regarding resolving disputes over children (Roberts, 2008).

Fisher (in Fisher & Shapiro 2007) identifies ways in which parties to negotiation might move beyond the dispute formulation articulated by Roberts (2008). Where each party blames the other and argues their own point at the cost of the other persons interests Fisher (In Fisher & Shapiro 2007), and the Project On Negotiation at the Harvard Law School, have identified five core concerns that they feel act as good levers towards settlement. According to the authors, rather than the normal adversarial process of pushing one's own position in argument, it is much more constructive to try to identify the core concerns of the other person in the negotiation and to explore the possibility that one's own needs could be met while meeting the needs of the other party. They assert that by recognising the core concern and, to some extent working with these core concerns, conditions for settlement can actually be created. Where negotiation is only focused on competing positions, there are limited options for settlement, and the negotiation process runs a great risk of becoming a bargaining process, or failing completely.

These five core concerns identified as appreciation, affiliation, autonomy, status, and a fulfilling role (Fisher & Shapiro, 2007). Appreciation refers to a person's desire for recognition, affiliation refers to the sense of belonging, autonomy to the ability to make decisions for himself, status refers to people's self-esteem needs, and a fulfilling role refers to a person's needs to invest in a particular outcome or situation.

These aspects are critical in mediation as a mediator relies largely on the resources of the clients, rather than being focused on the mediator as a subject expert (Roberts, 2008).

Roberts (2008:124) explains that in mediation negotiations between the parties have cyclical and developmental aspects. The cyclical process refers to the exploring of the issue between the clients and the flow of communication in the process. As this happens, the process incrementally develops towards a solution, and through certain phases of building agreement. The building is referred to as the developmental aspect.

3.6.3 The nature of mediation

Faris (2006), in his work, laments the fact that there is a broad spectrum of approaches when it comes to mediation. In the law mediators are appointed in various different pieces of legislation and the expectations on the mediators seems to change depending on where the mandate is coming from. However, when one refers to the nature of mediation, the picture is quite different; authors tend to agree strongly about what it is, while agreeing less on the desired approach and process employed by the mediator (cf Folb, 1993).

The strongest element of mediation in the literature relates to the self-determination of clients (Roberts, 2008; Haynes, 1994; Folberg, Milne & Salem, 2004; Irving & Benjamin, 2002; Kruk, 1997). In mediation, the clients control the outcome. Even in settings where mediation is mandatory clients are not forced to settle, the outcome of the mediation remains voluntary (Roberts, 2008; James et al., 2010). The self-determination of the clients goes so far as to include input in the agenda of the mediation process. In mediation clients speak for themselves, rather than speaking through representatives (Haynes, 1994).

Mayer (2000) holds the underlying assumption that parties to the dispute are the best placed to arrive at creative sustainable solutions for their dispute. The role of the mediator is to aid this process, and it is not for the mediator to give expert opinion or to force a solution on clients.

Meanwhile, Irving (in Irving & Benjamin, 2002) has identified five principles that underpin family mediation. He agrees that self-determination is a very important principle and one which is often overlooked in the adversarial system in court. A dispute in court is often controlled by attorneys who understand the legal environment and who do not always see their task as

educating their own clients. Furthermore, the attorneys may not have full knowledge of the family situation and particularly the full range of options for solutions open to the family.

The other principles that Irving (Irving & Benjamin, 2002) adds to client self-determination are confidentiality, fairness and equity, full disclosure, and safety and security.

Irving (in Irving & Benjamin, 2002) has noted a strong agreement in the literature regarding the underlying goals of family mediation. These are to provide a process for families in conflict to work cooperatively, to provide a forum to table and explore the disputed issues between them, to provide a forum to explore any possibilities for reconciliation, to safeguard the best interests of the children, to help the negotiation process, and to arrive at a settlement (Irving & Benjamin, 2002).

3.7 MODELS OF MEDIATION

Social workers have a broad spectrum of models of mediation to employ. Some of these models will be discussed in this section.

Mediation as a dispute settlement mechanism has existed for thousands of years (Faris, 2006). As the earlier discussion established, the great benefit of mediation is client self-determination. As the mediation field has grown in prominence over the last 50 years or so, growing attempts have been made to better record how mediation is actually conducted (Emery, Sbarra & Grover, 2005; Folberg, Milne & Salem, 2004). This is particularly useful in a family setting as the family setting is well suited to mediation to solve disputes. Folberg (In Folberg, Milne & Salem, 2004) in his work, has attempted to summarise the models that are prevalent today. He categorises the models into the facilitative, evaluative and transformative.

3.7.1 Facilitative mediation

Early authors on the subject of mediation took the approach of facilitative mediation (Haynes, 1994; Folberg, Milne & Salem, 2004). According to this approach the mediator tends to be noninterventionist and nondirective. Mayer (in Folberg, Milne & Salem, 2004) identifies four aspects to facilitative mediation: that the party's thoughts, feelings and ideas are paramount in this approach, that it is not the mediator's role to try to persuade parties to accept an agreement,

that the mediator's opinion is not important, and that the parties themselves must develop the options for a solution.

This approach is very process oriented with the mediator providing an environment to support that process (Folberg, Milne & Salem, 2004). The process is client-centred in that the clients will determine the direction and pace of the process. It is communication focused in the belief that when parties communicate constructively they are likely to reach an agreement. Finally, the approach is interest-based and seeks to help clients understand their own needs and concerns more clearly and to explore how these needs and concerns might be met while meeting the other person's needs and concerns.

The role of a facilitative mediator includes providing an environment conducive to dispute resolution, helping people tell their story, identifying issues and interests in the negotiations, facilitating communication, gathering information, dealing with deadlocks, and generating commitment to agreements (Folberg, Milne & Salem, 2004).

3.7.2 Evaluative mediation

Evaluative mediation differs sharply from facilitative mediation (Folberg, Milne & Salem 2004). In evaluative mediation the mediator will make assessments regarding the conflict and make judgements on the content (Folberg, Milne & Salem, 2004). Riskin (in Folberg, 2004) identifies at least three activities for the mediator using an evaluative model: to assess strengths and weaknesses of each case, to develop and propose options, and to predict alternative outcomes. Evaluative mediation has as its absolute primary goal to resolve issues faced by the parties.

This approach is widely used in insurance and construction disputes where it is felt their issues are focused and clear (Folberg, Milne & Salem, 2004). The mediator tends to be an expert in the field and will use the expertise to understand and analyse each party's submission. The mediator's opinion holds sway as the mediator will openly give an opinion and weigh each argument (Folberg, Milne & Salem, 2004).

There are a number of possible benefits to this approach (Folberg, Milne & Salem, 2004). The first of these is that the approach is likely to get an agreement on paper. Once each party has

put forward a case the mediator and the solution to the parties and the matter is resolved. Involving an expert also means that the parties have access to expert knowledge that they otherwise might not have had. This expert knowledge can also be brought to bear on the process to influence a party in one direction or the other, thereby increasing the chance of settlement. Lowry (in Folberg, Milne & Salem 2004) asserts that having an expert opinion as part of the process gives disputing parties an excuse to agree. The expert opinion can be given as the reason for agreeing on a particular settlement, rather than losing face by being perceived as the loser in a negotiation.

There are, however, a number of dangers to this approach. An approach that relies this heavily on the expert knowledge of the mediator runs the risk of negating the benefits of client self-determination in mediation (Folberg, Milne & Salem, 2004). Where clients are not sufficiently empowered in the mediation process the long-term sustainability of the agreement, and the resolving of any future disputes, is strongly undermined (Folberg, Milne & Salem, 2004).

There is a danger that the evaluation of the mediator might be wrong (Folberg, Milne & Salem, 2004). Because mediation is an informal process, without the laws of procedure associated with court, there is no objective test as to the reliability of the information being provided at mediation (Haynes, 1994). Therefore, the information in front of the mediator might be wrong, the conflict could be defined too narrowly, and it seems to blur the line between consensual dispute resolution and adjudication.

Evaluative mediation is controversial in family settings (Folberg, Milne & Salem, 2004). Society is very careful about allowing a third party to bypass parents in the parenting of the children. The family system is seen to be the appropriate main decision-makers in issues regarding the family. This value is held so dear in South Africa that the High Court considers itself the upper Guardian of all children and it is only a court that can bind parents. Evaluative mediation flies very close to being an adjudication process, which would contradict the firmly held values of society regarding families and their ability to make appropriate decisions for their own lives.

Mediation has an underlying belief and assumption of a family's potential to determine its own future (Irving & Benjamin, 1987; Irving & Benjamin, 2002; Haynes, 1994), and evaluative mediation is controversial in family matters (Folberg, Milne & Salem, 2004). The reason for

this is that arbitration is not allowed in family matters and evaluative mediation runs the risk of disempowering families (Folberg, Milne & Salem, 2004). There are aspects of the regulations and forms accompanying the Children's Act 38 of 2005 that indicate that the legislators had some intention to have the mediators act as evaluative mediators (Republic of South Africa, 2010). This presents a further challenge for mediators.

Form 10 of the Children's Act (Republic of South Africa, 2010) requires that mediators certify that the parenting plan meets the best interests of the child. The legislators of the Act seemed to assume that a social worker mediating in terms of the Act will use their expert knowledge in order to satisfy the court that the proposed plan is in the children's best interests. An evaluative approach to family mediation is at very least controversial (Folberg, Milne & Salem, 2004), and literature (Folberg, Milne & Salem, 2004) warns against using an evaluative approach in family and divorce mediation. Form 10 seems to force the mediator mediating in terms of the Children's Act into position where either the requirements of proper assessments are undermined, or the ethics and assumptions of mediation are undermined.

The Companies Act 71 of 2008 (Republic of South Africa, 2011) has a similar shift towards mediation, and alternative dispute resolution. It is interesting to note that the corresponding form of the Children's Act form 10, form CTR 132.3, does not require the mediator in the commercial matter to make any undertakings such as those expected of a mediator mediating in terms of the Children's Act. Even though the literature would say that evaluative mediation is acceptable in the commercial mediation environment (Folberg, Milne & Salem, 2004), the forms related to the Companies Act do not encourage it. The Companies Act form indicating that a mediation has failed merely certifies such, with no explanation. Where mediation is successful, an agreement is entered into by the two parties, who can then make it an order of a court. No further certification is required from the mediator, who merely helps parties in their negotiation.

The forms accompanying the Children's Act are controversial in terms of international norms and South African principles regarding dispute resolution in family matters.

3.7.3 Transformative mediation

Transformative mediation sees conflict as providing a downward spiral for the disputing parties (Folberg, Milne & Salem, 2004). In the spiral parties become less and less able to resolve the conflict constructively. A transformative mediator helps clients move from a negative conflict cycle to a positive collaborative cycle (Folberg, Milne & Salem, 2004).

Proponents of the transformative model identify three aspects of negative conflict (Folberg, Milne & Salem, 2004). These are that it is destructive, alienating, and demonising. In this conflict cycle the participants are too weak to resolve the conflict and self-absorbed in how they understand the conflict. On the other hand, conflict dealt with appropriately is constructive, connecting, and humanising. The participants in this kind of conflict are responsive and have a strong capacity to resolve conflict (Folberg, Milne & Salem, 2004).

In order to help clients move from the negative cycle to the constructive cycle the mediator benchmarks the language of the participants that indicates weakness and self-absorption (Folberg, Milne & Salem, 2004). This benchmarking sets the starting point for helping the clients move to a more positive cycle. The mediator reinforces positive language but seeks not to be directive in the process. The mediator will seek to activate capacities in the parties for strength. The aim is that, despite being in a conflict situation, the clients are calm, clear, more confident, trusting and responsive (Folberg, Milne & Salem, 2004).

3.8 SOCIAL WORK AND LEGAL EXPECTATIONS OF THE SOCIAL WORKER MEDIATING

The Children's Act 38 of 2005 identifies social workers as being suitable for mediating family matters. In terms of section 21 of the Children's Act if there is a dispute in terms of this section the matter must be referred to for mediation to a Family Advocate, social worker, social service professional or other suitably qualified person. Section 33 makes provision for mediation by a social worker or other suitably qualified person; section 46 and 71 remain silent on who is an appropriate mediator in matters referred from the Children's Court.

A glaring commonality in the sections is that social workers are identified as being appropriate in mediating family matters. A reading of this section indicates that social workers can expect

to receive mediations regarding the parental responsibilities and rights of an unmarried father, where co-holders of parental responsibilities and rights are having difficulty exercising those responsibilities and rights, and/or where the children's Court has referred the family matter for mediation.

It is clear from the preceding argument that a social worker mediating is required to engage in deep self-reflection regarding the boundaries between social work and mediation. The discussion will now explore this more closely by testing the applicability of the scope of practice of a social worker in mediation environment.

3.8.1 Eco-metric testing

Eco-metric testing in a mediation environment should be used with caution (In Folberg, Milne & Salem, 2004)). Traditionally assessment tools are utilised in order to make recommendations and to provide the social service professional with a clearer picture of the situation (Kadushin, 1997). Mediation is strongly about the client's views on their own situation, and not so much about the mediator's view. A mediator's role is limited to aiding clients to reach a solution which they both find acceptable. To make an adjudication or express an opinion would represent the mediator going too far in terms of the mediator's role (Folberg, Milne & Salem, 2004; Haynes, 1994).

Notwithstanding this warning, eco-metric testing is utilised in mediation. Mediation assumes that the clients will be able to negotiate on a more or less even footing. There are a number of factors that may undermine the mediation process related to client's inability to negotiate on an even footing (Argiroff, 2012). At times the inequality will be so great as to contraindicate mediation altogether (Argiroff, 2012; Johnson, Saccuzzo & Koen, 2005; Ellis & Stuckless, 2006). This inequality should ideally be identified early in the process in order to avoid harm to clients and the mediator (Boulle & Boulle, 1997).

Mediation good practice insists that some form of screening is conducted at the beginning of the process in order to assess suitability for mediation (Boulle & Boulle, 1997). In Michigan, in the USA, the courts use a standard screening tool in order to match clients to the most effective process and to ensure safety where domestic violence has occurred (Michigan Supreme Court, 2006). There are a number of other tools that accomplish similar objectives and

which, in the hands of a social worker may provide useful support to the mediation process (Johnson, Saccuzzo & Koen, 2005; Ellis & Stuckless, 2006).

In summary, eco-metric testing could have a place in mediation as long as it is used in the interests of clients and not to help the mediator form an opinion or make an adjudication or recommendation. Client self-determination remains paramount in the mediation process.

3.8.2 Case management

The SACSSP cites Norlin and Chess (1997) in their outline of what is involved in case management (www.sacssp.co.za). They identify four aspects: helping to develop goals and make informed decisions regarding opportunities; aiding access to services; developing services; and advocacy on behalf of clients. These have special application in the mediation field.

3.8.2.1 Developing goals and making informed decisions

A mediator relies heavily on the client's ability to develop goals and to make decisions (Folberg, Milne & Salem, 2004; Haynes, 1994). The environment where the client is faced by their ex-partner is not necessarily the most creative environment for decision-making. Clients in a mediation process are often supported by other professionals and the mediator is limited as to the extent to which he/she can take on the role of emotional support. While engaging with clients to offer emotional support, the mediator is required to collaborate with other professionals and respect needs and rights of clients.

3.8.2.2 Facilitating access to services

A mediator would generally stop short of ensuring that client access and use services effectively (Haynes, 1994). This raises a dilemma for a social worker who would be inclined to encourage and facilitate access to resources. In the United Kingdom best practice for mediators requires mediators to have a policy for "flagging and signposting", which aims to address this challenge for mediators (<http://www.parliament.uk/pac>).

3.8.2.2.1 Signposting

Signposting is a process whereby a mediator maintains a comprehensive list of possible resources for clients (<http://www.parliament.uk/pac>). When the mediator identifies that clients

may be in need of a particular service, the mediator will share the contact details with the clients. It will be the responsibility of the clients to make contact with the resource.

3.8.2.2.2 Flagging

Flagging refers to the practice of identifying when clients have a particular need and no resource seems to exist to meet the needs of the client or clients (<http://www.parliament.uk/pac>). The intention is that by recording these needs information can be shared with relevant organisations and communities in order to explore developing resources.

3.8.3 Casework

Casework in social work relates to the face-to-face interventions of a social worker with individuals, families, and couples. The SACSSP places a strong emphasis on social work of all of advocacy on behalf of these clients.

The role of the mediator has a strong casework component. A mediator will engage with disputing parties in order to help them explore solutions. A mediator cannot be said to be mediating if the process is limited to one client. Mediators deal with multiple disputing parties.

The objectivity of the mediator requires that a mediator who has done work with one of the clients in the dispute may not mediate in the dispute (Kruk, 1997). Practically put, a social worker seeing a client on a counselling basis, or where the client has sought some other social worker service from that social worker, cannot then mediate in a dispute between that client and another person. The mediator may not use the role of mediator to advocate in favour of the interests of one client or the other. Both disputing parties are the clients of the mediator.

3.8.3.1 The participation of children

Legislation associated with mediation in South Africa, particularly where there is a dispute around parental responsibilities and rights, requires the children participate in the process (Republic of South Africa, 2010). Regulation 11 of the general regulations attached to the Children's Act 38 of 2005 requires that the children be consulted at two points in the mediation process: during the development of the parenting plan, and informed of the plan after it has been concluded. The regulations are clear that the professional person communicating with the children must be a social service professional, or other suitably qualified person. This concurs

with De Jong (2008) who strongly asserts that the professional speaking to children must have the required training. The interviews with children required by this legislation are unique and a social worker is expected to combine knowledge of legislation with the skill of communicating with children.

3.8.4 Group work and community work

The case of group work in mediation is an interesting topic. On the one hand organisations such as Relationships Australia (Relationships, 2013) use group work in order for clients in mediation towards divorce to receive support from other people in a similar situation. This is a practice also used in the USA in areas such as foreclosure mediation where the groups are used to empower clients to negotiate better on their own behalf.

Anecdotal evidence points to the fact that in indigenous cultures conflict resolution was not only a responsibility of the disputing parties. Models for conflict resolution in Africa, for example involve family members and members of the wider community. These cultures were sensitive to the idea that the solution following a dispute is most sustainable when supported by other meaningful role plays in the system.

The Office of the Family Advocate in South Africa has introduced a novel form of group work in mediation. As part of a mediation in terms of section 21 of the Children's Act 38 of 2005, the Office will invite a number of disputing couples to a mediation workshop in order to resolve the dispute around parental responsibilities and rights of an unmarried father. This approach is novel in the sense that instead of the traditional approach of "many people involved in one dispute/solution" the approach brings multiple disputes and parties before a mediator at one time.

The consensus in the literature (Folb, 1993; Kruk, 1997; De Jong, 2008) seems to point to group work as a method to support the mediation process through the empowerment and strengthening of the family system. Group work as a methodology to finalise as many mediations as possible in a single session is not supported in the literature.

3.8.5 Social work administration

The emphasis of the SACSSP regarding social work administration is the organisation and the organisation's goals and objectives (www.sacssp.co.za). This support function of administration is an important part for a social work mediator.

As has been discussed earlier in this chapter, a social worker mediator has certain dilemmas to resolve regarding administration. The mandate of the mediator is strongly related to helping disputing clients resolve their conflict. The administrative goals should serve this objective while ensuring that social worker does not fulfil of ethical requirements of social work administration.

One of the ways in which this problem has been resolved has been through the use of "mediation summaries" (Family Mediators Association of the Cape, training manual, 2009). This practice is promoted by FAMAC and KwaZulu Natal Association of Family Mediators in order to meet the requirements of professionals to keep notes and to help clients in contributing towards developing a solution in the mediation process (www.nabfam.org). The mediation summary is used to summarise the proposals put forward by the negotiating parties. This summary itself is not binding but is used as a tool to carry fire proposals to both parties, and for the parties to obtain advice regarding the proposals.

3.8.6 Social work research

Mediation provides rich soil for research work (Kruk, 1997). The reflective social worker has ample opportunity to research issues due to the semi-formal nature of mediation, the complex issues involved in family disputes, and the well-defined agendas that each case works with (Johnson, Saccuzzo & Koen, 2005).

3.9 THE MEDIATION PROCESS

In the practice of mediation social workers follow a mediation process which will be discussed in this section.

The social worker mediating in terms of the Children's Act is faced with a number of theoretical questions to solve before mediation can be performed in a professional manner. Rycroft (in Boule & Boule 1997) gives a useful elucidation of the matter. The authors underpin the issue of the mediation process with a discussion on different models of mediation. While there can be said to be a general model for mediation, this general model lends itself most strongly to the facilitative mediation model (Boule & Boule, 1997). The reason for this is that the facilitative model is more concerned with process and less concerned with outcomes (Boule & Boule, 1997).

Flexibility

Mediation is an informal process which allows for the creativity of the mediator (Haynes, 1994; Boule & Boule, 1997). As a result the process tends to be flexible even, as Rycroft points out (in Boule & Boule, 1997), where mediation is required by law. The author makes the point that the process is affected by the model of mediation being used; attributes of the mediator; attributes of the dispute and disputants; the financial situation of the disputants; and larger external factors such as the law in a specific situation.

Rycroft (in Boule & Boule, 1997) divides the mediation process into the preparatory phase, the mediation meeting, and post mediation activities. Each of these phases will now be discussed.

3.9.1 Preparatory phase

3.9.1.1 Motivation of clients

The early part of the mediation process is important in setting the tone for the mediation process. Clients seeking mediation typically display different levels of motivation. It may be that both clients are in favour of mediation and present themselves voluntarily. Alternatively, it may be the case that one client is in favour and the other is, at very least, ambivalent regarding the mediation process. Thirdly, it may be that neither party has chosen mediation voluntarily but has been encouraged to attend either by a court or by other family members.

3.9.1.2 Intake and screening

Part of the mediator's task is to conduct the intake and screening of the clients. Not all disputes are appropriate for mediation and the mediator is required to assess the suitability of a particular dispute for mediation. The intake procedure is an opportunity to help address initial concerns

of clients as well as to educate clients regarding the mediation process. Rycroft (in Boule & Boule, 1997:88) makes the observation that a sophisticated intake procedure is more important where referrals of clients are coming from third parties. This is relevant in the context where mandatory mediation is employed.

3.9.1.3 Gathering information

The gathering of information is another of the features of the early stages of the mediation process. The mediation process does not possess the same rigorous processes of court in dealing with information and a mediator would tend not to be overly concerned about the factual basis of information. Information in mediation is used to help move clients towards a solution and the relevance of particular information is judged by that standard. By being asked to mediate, the social worker is not mandated to do an assessment, so any instincts to collect assessment information must be curbed by the social worker.

3.9.1.4 The mediation space

An important preliminary consideration by the mediator relates to the space in which the mediator will mediate. Mediation typically involves the review of documents, the exploring of possible solutions, and the recording of agreements. This is more easily done when the mediation space has a table.

A social worker who primarily conducts counselling does most sessions in an environment without a table. The different requirements of mediation as opposed to counselling and/or assessment work requires the social worker mediator to consider the impact of multifunctional space and to ensure that the space does not negatively impact possible outcomes in the mediation process.

Another consideration regarding space is arrangements for clients to wait in a reception area. Safety issues need to be considered and it is preferred that clients do not need to wait for long periods unattended in a small area.

3.9.2 Contact with clients

The following steps outline the tasks of the mediator during meetings with the clients. The process starts with a preliminary meeting and culminates in the final tasks of ratifying and reviewing any proposals raised in the course of the mediation.

3.9.2.1 Preliminary meeting

A mediator may choose to have a preliminary meeting with each of the clients. An individual meeting between the mediator and the clients offers the mediator an opportunity to form a report with each of the clients which can be used in the process later on to explore solutions in an environment of trust. The mediator is also able to balance any imbalances in knowledge regarding the process which, in a joint session is more difficult.

Rycroft (in Boulle & Boulle, 1997) points out that this contact increases the cost of the process and is more likely in private mediation settings as opposed to mediations that take place in agencies. A mediator conducting a preliminary meeting would have specific objectives:

- “to assess the parameters of the dispute
- to specify what issues will be dealt with at the mediation meeting;
- to arrange for the disclosure and exchange of information;
- to establish that the parties at the mediation meeting will have authority to settle;
- to identify the participants in the mediation meeting;
- to settle the agreement to mediate; and
- to make organisational arrangements.”

Mediation often takes place in a climate of escalated emotions so the preparation of the mediator is an important aspect contributing to the success of a mediation process. The preliminary meeting gives the mediator the opportunity to develop an initial impression before the negotiations commence in earnest. From here the mediator proceeds with the formal aspects of the mediation process.

3.9.2.2 Agreement to mediate

A social worker mediating as part of a broader job description must ensure that clients are clear on the nature of the service that the social worker is presenting (Kruk, 1997). The agreement to

mediate is a contract between the social worker and clients which sets out the social worker's relationship with the clients as a mediator (Boulle & Boulle, 1997). The danger of role confusion is somewhat averted when the social worker has spent time in the preliminary meeting explaining the boundaries to clients. Concluding a written agreement with clients delineates the beginning of the process and mitigates against any ambiguity regarding the role of the social worker and the expectations of the clients.

The agreement to mediate should include details on the nature of mediation and how fees are to be paid (Boulle & Boulle, 1997). It is normal practice for each client to contribute towards the fees equally, except where the parties have agreed to a different arrangement.

3.10.3 Stages of the meeting

The meeting with the clients has the following stages:

3.9.3.1 Preliminaries

Once the initial contact with the client has been taken care of, the process moves into the mediation meetings (Boulle & Boulle, 1997). The mediator has strong influence over the tone and environment of the mediation. The tone is set from the beginning and the initial exchanges between the clients and the mediator are important for laying a foundation for the rest of the process. Included in the preliminary aspects to be dealt with are the ground rules for the meeting, time limits of the clients and the mediator, appropriateness of the venue, related legal proceedings, amongst others.

3.9.3.2 Mediator opening statement

With the two preliminary aspects dealt with, the mediator then makes an opening statement. This statement should contribute towards the clients' confidence in the mediator and their commitment to the mediation process. Rycroft (in Boulle & Boulle, 1997) usefully sets out the following aspects of an opening statement for a mediator:

- “express appreciation of the choice of mediation by the clients;
- explain the voluntariness of the process;
- explain the collaborative problem-solving nature of mediation;
- outline the rules of the mediator of the rules of the parties;

- explain the mediator's impartiality;
- outline the mediation process;
- ensure that the clients have authority to make decisions in the dispute being dealt with (normally this will require being a holder of parental responsibilities and rights);
- lay down some ground rules for the process;
- explain the extent of confidentiality in the process;
- explain special conditions or mandates pertaining to the mediation process to the client. This will include how reporting will operate;
- gain commitment to the process from the parties. If the agreement to mediate is not yet been signed, the commitment can be reinforced by the signing of the agreement to mediate at this point."

The mediator's opening statement should leave the clients confident regarding the role of the mediator and with a clear picture of expectations on them as parties to the mediation. Once the mediator has completed the opening statement it is the turn of the clients to give their brief opening statements.

3.9.3.3 Client opening statements

Each client is then invited to make an opening statement (Kruk, 1997; Boulle & Boulle, 1997). The nature of mediation is such that clients are engaged in collaborative problem solving, so the opening statements as far as possible are not meant to take on adversarial tone (Kruk, 1997). Haynes (1994) makes the observation that most client opening statement have the structure of reinforcing the speakers own "correctness" and highlighting the other clients "wrongness". The role of the mediator is to move the discourse from this positional thinking to an interest based collaborative thinking (Kruk, 1997; Haynes, 1994). The skill of the mediator in this phase is engaged in avoiding an inquisitorial stance and taking up a stance that provides an impression to the client that the mediator is trying to understand the issues (Kruk, 1997). The mediator achieves this by summarising, checking understanding of listening actively to both clients (Boulle & Boulle, 1997).

3.9.3.4 Identifying areas of agreement

In listening to the parties the bias of the mediator is to listen for points of agreement (Haynes, 1994; Boulle & Boulle, 1997). In summarising what clients are saying, the mediator will look

for opportunities to reframe and mutualise in a way that moves away from an adversarial discourse to a collaborative discourse. In facilitative mediation the mediator will especially focus on mutually agreed interests and needs in order to build a foundation for agreement (Boulle & Boulle, 1997).

3.9.3 .5 Defining and ordering issues (clarifying the agenda)

Once the mediator has listened to each of the clients' opening statement, the mediator will seek to agree on an agenda with the clients (Kruk, 1997; Boulle & Boulle, 1997; Section 33 of the Children's Act 38 of 2008). The agenda in family and divorce mediation can be broad, however, in terms of the Children's Act 38 of 2005, the agenda is likely to include one or more of care, contact, maintenance, and guardianship.

The mediator may choose to order the agenda in a way that facilitates the best prognoses for settlement (Kruk, 1997). Mediators will normally begin by reinforcing areas of agreement before moving on to areas of strong disagreement (Boulle & Boulle, 1997). In this way a certain momentum is built up in the agreement building process.

3.9.3.6 Negotiating and decision-making

The negotiation phase of the mediation process can be regarded as the working phase (Boulle & Boulle, 1997). This phase is likely to take up most of the mediation process. The mediator will be directed by his/her theoretical model as to how directive he or she is in this phase of the process. A facilitative mediator limits themselves to facilitating communication between the parties and will not intervene to affect pace or content of the session (Haynes, 1994; Boulle & Boulle, 1997). Mediators who take on an evaluative approach will be more directive and push clients towards settlement (Folberg, Milne & Salem, 2004; Folberg, Milne & Salem, 2004).

Clients in this stage of the mediation process develop and explore different possible scenarios and evaluate the scenarios on the table (Kruk, 1997). The tone of the process is much like brainstorming in order to find a creative solution in a non-adversarial or judgemental environment.

Negotiations regarding family, and particularly children, should not be of a bargaining nature (Roberts, 2008). The interests and needs of the clients are paramount, and where children are involved the children's best interests must be safeguarded in the discussion. Positional

bargaining between parents regarding circumstances involving the child is likely to disregard best interests of the child principles.

3.9.3.7 Caucusing

Caucusing is regarded as an acceptable tool in mediation (Boulle & Boulle, 1997). Caucusing refers to the mediator meeting separately with one or each of the clients in dispute. In family and divorce mediation caucusing is used sparingly. One of the benefits of mediation is that it has the ability to be transformational: clients who have been unsuccessful at resolving disputes between them are introduced to new ways of engaging and resolving those disputes (Benjamin & Irving, 2004). This benefit is limited if the mediator caucuses with each party, as the clients have limited direct contact in such a process.

3.9.3.8 Final decision making

Once different scenarios are explored, the mediation process moves to making final decisions (Kruk, 1997; Boulle & Boulle, 1997). The emphasis at this stage is strongly on the present and the future, as opposed to revisiting issues of the past (Haynes, 1994).

3.9.3.9 Recording decisions

The outcome of the mediation process is normally reduced to writing (Kruk, 1997; Boulle & Boulle, 1997). When the clients have reached agreement, the mediator will write up the points of agreement; where the clients have been unable to resolve the dispute, the mediator will issue a certificate of outcome which confirms this to the clients.

The language of the final agreement should be such that the clients recognise their agreement and the clients should participate in the drafting of the agreement and be allowed to correct any inaccuracies that they identify in the agreement (Boulle & Boulle, 1997).

3.9.3.10 Closing statements and termination

The mediator formally closes the mediation process by referring back to the agreement to mediate (Boulle & Boulle, 1997). The mediator might give a short summary of the process as a means of terminating. The mediator will also confirm with the clients which steps would be taken next in order for the agreement to take effect. For example, the clients have the option either of making a mediated parenting plan in order of court, or registering the parenting plan

with the office of the family Advocate (Republic of South Africa, 2010). The social worker mediator will need to know how to give effect to any one of these options.

3.9.4 Post mediation activities

3.9.4.1 Ratification and review

The clients might require that the agreement be reviewed by attorneys, or some other interested people (Kruk, 1997; Boulle & Boulle, 1997). According to Regulation 11 of the Children's Act 38 of 2005, this step would include informing children mentioned in a mediated parenting plan of the contents of the plan, a task of the mediator.

3.9.4.2 Referrals and reporting

The confidentiality of the mediation process is highly respected. However, the confidentiality principle in mediation does not supersede a social worker's duty to report certain issues (Kruk, 1997). A social worker may report issues of child abuse, and intention to commit a crime, and other issues that a social worker would normally report (www.nabfram.org).

A referral of clients directly to other services such as psychological counselling would be considered a breach of confidentiality if the permission of the client has not been obtained (Boulle & Boulle, 1997).

3.9.4.3 Mediator debriefing

Rycroft (in Boulle & Boulle, 1997) identifies mediator debriefing as the final post mediation activity. In some settings mediators work in tandem and mediator debriefing occurs spontaneously. In other settings mediator debriefing might happen periodically. The debriefing session allows mediators to evaluate the mediation process and aspects of particular processes that helped develop solutions and those that detracted from helping the clients reach a settlement.

It is evident that literature (Folberg, Milne & Salem, 2004; Haynes, 1994; Boulle & Boulle, 1997) provides a clear framework for mediators to produce a clear mediation process. While authors have slightly different nuances, the basic structure of mediation is clearly identifiable, even though some of the underlying assumptions of mediators may differ (Folberg, Milne & Salem, 2004; Boulle & Boulle, 1997). This provides useful guidelines for mediators seeking to provide structure to a mediation process.

3.10 DEALING WITH DOMESTIC VIOLENCE

A central focus of this study is the experience of social worker mediators. An area which is likely to pose great challenges for the social worker mediating is the decision whether to mediate a domestic violence case, or not. The issue of domestic violence is a common area of practice for social workers, and an area where much advocacy is done on behalf of victims (Kruk, 1997). Due to the expert knowledge of social workers regarding domestic violence and its consequences, social workers are likely to be trusted with a decision as to whether a particular case where domestic violence is alleged is suitable for mediation or not (Argiroff, 2012).

3.10.1 Challenges of mediating in Domestic Violence cases

Argiroff and Shiemke (Argiroff, 2012) summarise the problem with mediating a domestic violence case as follows:

- In family mediation, it is most often expected that the disputing parties negotiate with each other, in the presence of the mediator, in the same room at the same time. This could be dangerous to the victim, and offers the perpetrator an opportunity to abuse further;
- Mediation requires both parties to enter the process in good faith and to disclose. In a case where domestic violence is present, neither the perpetrator nor the victim may be willing to share sensitive details;
- The social worker mediator is placed in a difficult position when disclosures of violence are made in mediation. The process is considered confidential and suddenly there is a difficult decision for the mediator to make regarding thresholds. In other words, is the violence being reported serious enough for the mediator to break confidentiality?;
- Mediation is not concerned with behaviour change. The mediator would be going beyond his/her mandate as a mediator to try to change the behaviour of either party. Where domestic violence behaviour occurs, proper mediation might only be possible when the abusing behaviour has been redressed;
- Finally, domestic violence may involve criminal acts that are left unpunished in mediation. The effect of allowing the situation is that it will give truth to the assumptions

of the perpetrator that the domestic violence is warranted, and probably an effect of the victim's behaviour.

3.10.2 The international context

It is obvious that, when dealing with the decision to mediate a case where an accusation of domestic violence has been made, the stakes are very high. Fortunately for the South African social worker mediator, these issues have been internationally researched and some assessment tools have been developed to support the mediator in the decision. One such tool is Domestic Violence Evaluation (DOVE) (Ellis & Stuckless, 2006).

The tool has been developed to make divorce mediation a safer prospect for abused women and entails a 19 item assessment which leads to clients being categorised according to their risk profile. The authors of this instrument warn users that it is not a replacement for professional judgement, but rather an aide to supplement the decision-making of the professional (Ellis & Stuckless, 2006).

A study conducted in Southern California lays out the importance of the mediator in making the decision regarding suitability when domestic violence is involved (Johnson, Saccuzzo & Koen, 2005). The concern of these authors arose out of the absolute requirement for mediation in child custody disputes in several states in America. It prompted the question as to the safety of victims of domestic violence in such a legislative environment. The findings in that study were a frightening indictment on the mediators surveyed: the mediators failed to identify domestic violence in nearly 57% of the domestic violence cases, and the screening process did not pick up domestic violence in 14.7% of violent cases (Johnson, Saccuzzo & Koen, 2005). The screening process, however, involved a mere five questions, rather than the 19 item assessment of Ellis et al (2006):

- "1. Does either party alleged domestic violence?
2. Will either parent request to be seen separately?
3. Are there any domestic violence restraining orders?
4. Are there allegations of child abuse?
5. Is Child Protective Services involved with your family?" (Johnson, 2005: 1030)

A significant feature of the Southern California study was the discrepancy between the perception of the mediator and the actual facts related to the case (Johnson, Saccuzzo & Koen, 2005). The researchers had access to the mediators as well as the official documentation related to the case and were able to correlate reported answers of the mediators and the actual facts. The study indicated that the perpetrators of domestic violence seemed to be able to influence the mediators in favour of the perpetrator. As a result, domestic violence was underreported by the mediator and the outcomes, where an evaluative aspect existed in the mediation process, disregarded the violence and coercive behaviour in the relationship. The researchers are unambiguous in their recommendation: "Child custody mediation should not be mandated in cases of Domestic Violence" (Johnson, 2005:1022).

3.10.3 The South African context

The challenges for mediators in the UK and America hold true in the South African context. A social worker mediating will need to resolve the problem as to how the decision to mediate in domestic violence cases is made. The Southern Californian study was especially dramatic because of the mandatory nature of mediation in many states in America. The Minister of Justice in South Africa has begun a process where mediation is prioritised and draft court rules published in 2011 indicated that mediation would be mandatory in all High Court matters (www.derebus.org.za/draft-mediation-rules/). If implemented these court rules would apply to family matters being heard in the High Court. The situation faced by social workers mediating in South Africa would be very similar to the Southern Californian reality and the screening process would need to be closely scrutinised in order to ensure that victims of domestic violence are not exposed to further violence around the mediation process. Furthermore, mediators will need to be aware of the international experience and manage their own perceptions where domestic violence has been alleged.

As it stands though, the Minister has instituted a voluntary court annexed mediation program in the magistrates Courts and therefore the problems generated by a peremptory mediation process have not yet come to a head in the South African context (www.golegal.co.za/wp-content/uploads/2016/12/Court-Annexed-Mediation-Rules-of-the-Magistrates-Courts.pdf).

The point remains that cases where domestic violence has occurred, and where the safety of clients cannot be assured, should not be mediated due to the inordinate imbalance of power in the relationship.

3.10.4 Mitigating negative effects of mediation on victims of Domestic Violence

The findings of various authors (Argiroff, 2012; Johnson, Saccuzzo & Koen, 2005; Ellis & Stuckless, 2006) advance the principle that domestic violence must be taken seriously by a mediator. Argiroff (2012) has helpfully outlined the following five important considerations regarding mediation and domestic violence to help the mediator:

- The mediator must have a domestic violence protocol;
- the risks of mediation should be discussed with clients;
- the mediator should be properly trained;
- agreements should not be finalised in the session. Time should be allowed for both parties to consider the contents, and not to be coerced;
- the mediator should assess each party safety between each session.

The issue of dealing with domestic violence cannot be glossed over. The social worker mediator is highly likely to have to assess the appropriateness of a particular domestic violence case for mediation. In an environment where mediation is made compulsory, such as in certain states in America and as contemplated in South Africa (cf Section 33 of the Children's Act 38 of 2005), it is critical for the social worker mediator to integrate a plan for dealing with domestic violence into the mediation process. The goal of this is to protect the parties, the mediator, and the children involved.

3.11 CONCLUSION

This chapter has dealt with the role of social workers mediating family disputes in terms of the Children's Act 38 of 2005. In doing so, the chapter sought to address the fourth objective of this study. The social worker mediating must balance the mandates and demands of the profession, with the mandates and demands of the mediation field. While there are various strongly congruent values and principles, there are also dangers and pitfalls. Not least of these is the issue of domestic violence, and it is critical that the social worker mediator is well-trained to deal with the full spectrum of challenges that he or she will face in practice.

CHAPTER 4

EXPERIENCES AND VIEWS OF SOCIAL WORKERS MEDIATING IN TERMS OF THE CHILDREN'S ACT 38 OF 2005 38 OF 2005

4.1 INTRODUCTION

This chapter will fulfil the third objective of this study, namely, to investigate experiences and views of social workers mediating in terms of the Children's Act 38 of 2005. It presents the empirical findings of the study, using the responses to the closed questions as well as the narratives of their experiences. The responses will be analysed in terms of the theory presented in the literature review in chapters two and three. The narratives will be organized in tables according to themes, subthemes, and categories. Each table will be followed by a discussion of the findings in terms of the literature review.

4.2 RESEARCH DESIGN

This study took a qualitative approach with elements of a quantitative approach and is an exploratory and descriptive study, addressing a topic in South Africa with little or no research attached to it (De Vos *et al*, 2011, 95). The exploratory aspect of this study comes about as mediation is not a mature field in South Africa. This is balanced by the fact that social workers are mediating in terms of the Children's Act 38 of 2005 and the experience of those mediators requires description in this research.

Bless and Higson Smith (in DeVos, 2011:106) assert that exploratory research is conducted to gain insight into a situation, phenomenon, community or individual. This study is designed to achieve that in an area where social worker mediators have little foundational knowledge on mediation to rely on.

This study also describes specific details of a situation and this is consistent with Neuman's (in DeVos *et al*, 2011: 106) understanding of a descriptive approach. This study is concerned with the "how" and "why" questions Neuman refers to. These questions are tackled in some detail to describe the experience of social workers mediating in terms of the Children's Act.

4.3 THE DEVELOPMENT OF THE QUESTIONNAIRE

The questionnaire was made up of a mix of open-ended questions, and closed questions (De Vos *et al.*, 2011:196-198). The open-ended aspect of the questionnaire facilitated the exploratory aspect of the study and opened the door to new insights regarding the experience of social workers mediating in terms of the Children's Act 38 of 2005. The closed questions focused the answers around themes identified in the literature and made it possible to compare the South African experience against the international norms set out in the existing body of literature.

A questionnaire is a preset order of questions answered by a participant in a study. There are a number of types of questionnaires (De Vos *et al.*, 2011: 186), and Delport (De Vos *et al.*, 2011: 186-190) lists mailed questionnaires, telephonic questionnaires, self-administered questionnaires, questionnaires delivered by hand, and group administered questionnaires. As well as the types of questionnaire, there are a number of formats of questionnaire to consider (De Vos *et al.*, 2011: 193).

The researcher e-mailed the questionnaire to each participant, and each participant was given the opportunity to raise any queries regarding the questionnaire in a follow-up telephone call from the researcher. The individual contact with each participant was aimed at ensuring a higher response rate to the questionnaire (cf Delport in De Vos *et al.*, 2011: 187). Each participant then completed the questionnaire, scanned the responses and emailed the questionnaire to the researcher.

Each questionnaire was printed by the researcher and summarized in a spreadsheet, consolidating the information of the participants into a single document in order to prepare for the data analysis stage.

4.4 ETHICAL CONSIDERATIONS

De Vos (2011:113) asserts that the right of social scientists to conduct research in social settings is balanced by the responsibility to meet high ethical standards.

De Vos (2011:115) highlights a number of critical ethical issues to consider when embarking on research. The most pressing of these is the avoidance of harm. Social scientists often have access to people who are vulnerable and avoiding harm must be especially foremost in the researcher's mind when embarking on research. This study was cognizant of this and chose to focus on the experience of social workers, rather than clients as the focus of study.

Another issue identified by De Vos (2011: 117) is the issue of informed consent. According to this principle, participants in the study must participate knowing the full extent of expectations and consequence of their participation. This study made use of a written consent form (Annexure A), which was explained to participants, who signed the document before participating in the study.

The formality of the initial contracting phase in this study ensured that the participants were clear on the status of the researcher and of the issues of confidentiality and the lack of compensation for participating. These are all further issues that De Vos (2011:117) identifies as potential ethical issues and these were all addressed in the Consent Form (Annexure A).

The research proposal for this study was scrutinized by the Stellenbosch University's Departmental Ethics Screening Committee (DESC), and approved. This approval infers that the study poses minimal risk to participants and is bound by a high ethical code.

4.5 PILOT STUDY

De Vos *et al.* (2011:240) state that a pilot study is necessary to ensure that interview schedules are adequate. For the purposes of this study three participants were chosen to perform a pilot and to ensure that the responses indicated that the participants understood what was intended from the questions. Each participant was briefed over the telephone. The briefing included an explanation of the consent form that they were required to sign before completing the semi-structured questionnaire. Each participant was given three days to complete the semi-structured questionnaire, after which they were contacted by telephone in order for them to debrief regarding the experience or to ask any questions or concerns they might have.

Both in the pilot and the main study, the participants found the questions to be clear and they reported that they enjoyed the process, especially the opportunity to think about their mediation work in a more focused way.

4.6 SAMPLE

This research is concerned with the experience of social work mediators mediating in terms of the Children's Act. The population is defined as the participants in the study who possess specific characteristics (Strydom in De Vos *et al*, 2011: 223). For the purposes of this study the population will include social workers working in private practice, and non profit organisations, who are mediating in terms of the Children's Act 38 of 2005.

The participants included in the study were chosen from this population, consistent with the definition of Strydom (in De Vos *et al*, 2011: 223) that a sample is a "subset of measurements drawn from a population in which we are interested".

Purposive sampling involves the researcher using their judgment regarding representivity to constitute a sample (Strydom in de Vos *et al*, 2011: 232). For the purposes of this study the researcher's judgment was informed by the parameters of the Children's Act, in which it states that the family advocate, social workers and others may mediate. The criteria for inclusion in the study was that the social worker meets the requirements of the Children's Act 38 of 2005 to mediate, and that the social worker routinely mediates as part of his/her daily tasks in private practice or at a non profit organization.

The sample was drawn by using a snowball technique in that social worker mediators were recruited and asked to identify other social workers whom they know to meet the criteria for inclusion (Strydom in De Vos *et al*, 2011: 223). The first participant was identified at a meeting of the KZN Association of Family Mediators. After she agreed to participate in the study she was asked to identify another social worker mediating who may be prepared to participate in the study. This process continued until saturation point was reached. In total the sample comprised of seventeen participants.

4.7 ANALYSIS AND INTERPRETATION OF DATA

The data was transferred into a spreadsheet by identifying key words in each response and capturing them into the spreadsheet. Once all responses were summarized in this way, the information was reviewed closely in order to identify recurring themes and patterns. The themes were compared to the themes that emerged in the literature review. The comparison of themes gave a rich context for the findings of the research. The findings were presented within the themes and produced a strong framework within which to present the research results (De Vos *et al*, 2011: 402-403).

4.8 RESULTS OF INVESTIGATION

The findings of this study are set out in two sections. Section A provides identifying details of the participants. Section B is a presentation of the empirical results analysed in terms of the literature review outlined in the preceding chapters.

SECTION A: OVERVIEW OF PARTICIPANTS

4.8.1 Profile of the participants

4.8.1.1 Geographical distribution

Table 4.1: Geographical distribution of participants

Province	Kwa Zulu Natal	Mpumalanga	Western Cape	Total
Participants	7	8	2	17
				N=17

Participants for the study were drawn from KZN, Mpumalanga, and the Western Cape. Of the seven participants from KZN, three were from Richards Bay and four from Durban. Of the eight participants from Mpumalanga, five were from Nelspruit, two from Barberton, and one from White River. The two participants from the Western Cape came from Cape Town.

4.8.1.2 Employer type

All the participants were qualified, registered social workers. All participants worked in a statutory environment within a non-governmental organisation or private practice.

4.8.1.3 Demographical details

Of the 17 participants, eight were White females, seven were Black females, and two were Black males.

Table 4.2 Demographical details

Gender	Ethnicity		Total
	Black	White	
Male	2		2
Female	7	8	15
Total	9	8	17

N=17

4.8.1.4 The context of social work practice

The South African Council for Social Service Professions has set out the scope of social work practice in a document available on their website (www.sacssp.co.za). According to that document social work services fall into one of the following: social work research, administration, community work, group work, casework, case management, and eco-metric testing.

This study had amongst its objectives to understand the changing roles of social workers mediating in terms of the Children's Act 38 of 2005. The first question in the schedule was aimed at determining the context within which mediation services are being offered in order to gain some understanding of the context that social workers mediating are working in.

Participants were not required to identify only one service but could name multiple services being offered either by themselves or their organisation. The results (illustrated below) indicate that by far most mediation is occurring by social workers who engage in casework. Mediators also engage in some case management, group work, and community work. Social work research, administration, and eco-metric testing each scored nil.

The information, organized into the categories offered by the SACSSP presents as follows:

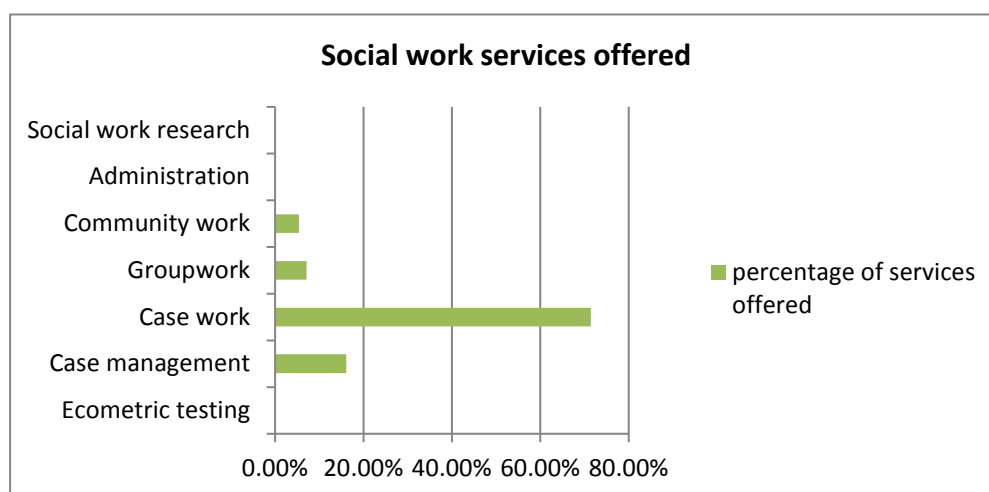


Figure 4.1. Social work services

The information suggested that casework (71,43%) followed by case management (16,07%), groupwork (7,14%) and then community work (5,36%). features most strongly in the type of work of social worker mediators.

SECTION B: EMPIRICAL RESULTS

The second section of the semi-structured questionnaire drew attention to the impact that the Children's Act 38 of 2005 has had on service delivery. The Children's Act 38 of 2005 represents a shift in legal understandings of the family and particularly parental responsibilities and rights. The responses of the participants threw light on how the law has impacted their services, particularly services to unmarried fathers.

4.8.2 Theme 1: The Role of Social Workers Mediating in terms of the Children's Act 38 of 2005

Mediation has grown in prominence as a dispute resolution mechanism and social workers are identified in the Children's Act as being appropriate to mediate. This question explored to what extent this mandate was being taken up by social workers.

The Children's Act introduces ways that social workers might interact with clients (Skelton, 2008). The bias of the Act is to resolve family conflict by way of mediation and to maintain shared parental responsibilities and rights, as far as possible. This is a consequence of the codifying of the Best Interests of the Child principle contained in Section 4 of the Act. The shift away from an adversarial stance in the law impacts the traditional functions of the social worker as forensic expert, counsellor and advocate. Chapter 2 of this study explored the theoretical and legal framework the mediator might lean on in order to deal with the expectations contained in the law and practice. The themes that were investigated include services to families in dispute, issues related to unmarried fathers, parenting as co-holders of parental responsibilities and rights, dealing with referrals from court.

Under this question, participants were also given the opportunity to comment on their observations on the impact of the Act on how Parental Responsibilities and Rights are exercised, and how involved parents are in parenting given this shift.

In order to support a qualitative approach to this question and to get the best possible feedback regarding the experience of social workers, open questions were asked in this section. It was apparent from the responses that the Children's Act provides a useful guideline for practice and strengthened the child-focus in the practice of the participants.

4.8.2.1 Subtheme: Services to families in dispute

Table 4.1 below summarises the responses of participants to the question: "What changes has the Act brought about in services offered to you by families in dispute?". An interesting feature of the responses to this section is that participants most commonly identified particular sections of the Act which have impacted their practice. The strong categories which emerged were the influence of the Act in a) giving guidance regarding role expectation and b) the increased focus on the best interests of the child.

Table 4.3: The Role of Social Worker mediating in terms of the Children's Act 38 of 2005

Theme 1: The Role of Social Worker mediating in terms of the Children's Act 38 of 2005		
Subtheme	Categories	Narratives
Services to families in dispute	Serves as a guideline	<i>"Gives social workers guidelines and information on how to deal with family disputes, clearly defines roles and responsibilities of all role-players."</i>
	Consider best interests of children	<i>Section 7, 10, 18, 19, 20, 21 and 22 best interest of the child, child participation etc.</i>
		<i>Consider the best interest of the child and involve the child in making a decision as well as other sections.</i>
		<i>Where a child is involved it must be mediated, court can order parties to mediate.</i>

a) Category: Serves as a guideline

The vast majority of responses indicated that the social worker mediating in family conflict takes guidance from the provisions of the Act. This was illustrated in two different ways in the responses. The first type of narrative indicated an outright recognition of the value of the Act in guiding practice. The following responses are examples of that:

- *"Gives social workers guidelines and information on how to deal with family disputes, clearly defines roles and responsibilities of all role-players."*
- *"The Act guides me when I mediate divorce and parenting plans to stay within the guidelines provided by the Act to reach agreements and plans that are within the law."*
- *"It guides me to act within the best interest of the children."*

Chapter 2 of this study explored the theoretical and legal frameworks in dealing with family conflict provided by the Children's Act 38 of 2005. In resolving the possible conflicts of typology and role expectation highlighted by Kruk (1997) and Folb (1999), the responses would seem to indicate that the social worker mediating relies heavily on the expectations in the law to set the parameters of mediation practice.

This finding is strengthened by the second type of narrative in the responses, where participants simply stated the number of the section of the Act which guided them in dealing with family conflict. For example:

- “Section 22, 23”
- “Section 18, 19, 20, 21, 22-fathers also have rights and responsibilities”

The sections cited in the responses relate to the sharing of parental responsibilities of rights and specifically around what they are (section 18), who may have them and under what conditions (Sections 19, 20, 21, 22 of the Children’s Act 38 of 2005).

b) Category: Consider the best interests of children

Section 4 of the Children’s Act has brought to prominence the best interests of the child standard. The best interest of the child standard has always been a big feature in South African family law, the emphasis has been created by the addition of section 4 which codifies a child’s best interests. The responses of the participants illustrated the impact that the Act has had in bringing the impact of conflict on children to the fore. Almost every participant made mention of child participation as an aspect that has changed as a result of the implementation of the Children’s Act. The following are three examples of the typical responses highlighting child participation:

- “Section 7, 10, 18, 19, 20, 21 and 22 best interest of the child, child participation etc.”
- “Consider the best interest of the child and involve the child in making a decision as well as other sections.”
- “Where a child is involved it must be mediated, court can order parties to mediate.”

It is significant to note that more than a quarter of the participants identify that children are being requested to participate in matters that involved them more than they were before the advent of the Children’s Act, and all participants (N=17) were of the opinion that parental responsibilities and rights are being considered more now than before the introduction of the Children’s Act 38 of 2005.

4.8.2.2 Subtheme: Services to unmarried fathers

The Children's Act represents a major shift in the rights of unmarried fathers. Before the implementation of the children's act, unmarried fathers (previously referred to as "fathers of children born out of wedlock") were required to make application to court to acquire rights in respect of this biological children. Section 21 of the Children's Act automatically assigns those responsibilities and rights on unmarried fathers where they meet certain criteria. Half of participants identified section 21 services as an important service being offered by their organization to unmarried fathers. Section 21 lays out a four-part test to determine whether an unmarried father acquires parental responsibilities and rights. In line with this, the experiences of the participants reflected a strong focus on section 21. Table 4.4 summarises the categories in some of the narratives that emerged from the participants when they reflected on services to unmarried fathers:

Table 4.4: The Role of Social Worker mediating in terms of the Children's Act 38 of 2005

Theme: The Role of Social Worker mediating in terms of the Children's Act 38 of 2005		
Subtheme	Categories	Narratives
Services to unmarried fathers	Advice and Signposting	<i>"Does he qualify for parental responsibilities and rights? If so, assist with parenting plan."</i>
		<i>"Usually do not realise their rights Section 21 will be explained to them and their responsibilities of maintenance."</i>
		<i>"Section 21, guides services we may offer."</i>
		<i>"Offers full parental responsibilities and rights if he satisfies Section 21 (1) (a) (b) (i) (ii) (iii) of the Act."</i>
	Mediation	<i>"The Act emphasises the important role of unmarried fathers and the role of mediation in including parents in parenting planning."</i>

a) Category: Advice and signposting

The Legal Services board in the United Kingdom identifies the importance for mediators to be able to flag and signpost services for client groups. What is meant by this is that clients will

approach social workers for advice and the social worker is required either to refer the client to the appropriate services (signposting) or make the relevant agency aware that there is a need for a new service to meet a client need (flagging). These activities are in line with the social worker tradition of advocating for vulnerable client groups. The participants in this study identified that these values come in to play when dealing with unmarried fathers. The following responses illustrate how clear the participants were when applying section 21 to this client group:

- *“Does he qualify for parental responsibilities and rights? If so, assist with parenting plan.”*
- *“Usually do not realise their rights Section 21 will be explained to them and their responsibilities of maintenance.”*
- *“Section 21, guides services we may offer.”*
- *“Offers full parental responsibilities and rights if he satisfies Section 21 (1) (a) (b) (i) (ii) (iii) of the Act.”*
- *“The Act emphasises the important role of unmarried fathers and the role of mediation in including parents in parenting planning.”*
- *“Section 21 guides any services we may offer.”*

Chapter 3 of the study explored different models of mediation (Haynes, 1994; Folberg, Milne & Salem, 2004). In family mediation the most commonly used model is facilitative mediation where the mediator facilitates the negotiation process but does not offer professional advice (Folberg, Milne & Salem, 2004). Evaluative mediation is an alternative model of mediation where the mediator is more inclined to offer expert advice. When the service is related to unmarried fathers it would seem that the participants in the study offered services which tended towards evaluative mediation as the four-part test contained in Section 21 represents a kind of assessment that the mediator is performing in the mediation process.

b) Mediation

Section 21 of the Children’s Act directs parties to mediation where there is a dispute regarding whether the man claiming parental responsibilities and rights as the biological father in fact has parental responsibilities and rights. This aspect was not lost on the participants of the study.

The form that the mediation would take is an application of the four-part test. In the case where an unmarried father acquires parental responsibilities and rights in respect section 21 further mediation may take place in terms of section 33(1) which entitles the co-holders of parental responsibilities and rights to create a parenting plan.

4.8.2.3 Subtheme: Services to coholders of parental responsibilities and rights

The Children's Act has a strong child orientation. One of the implications of this is that care and relationships are seen from the perspective of the child. Section 4 of the Children's Act lays out a hierarchy of best interest issues. At the top of the hierarchy of the relationship of the child with meaningful people. This orientation is further enhanced by the sections of the Act that allow for the sharing of parental responsibilities and rights. Parental responsibilities and rights are most obviously shared by biological parents of a child, but the Act also allows for parental responsibilities and rights to be shared with more than just the biological parents. These parental responsibilities and rights may either be specifically or fully shared. The question on "Services to coholders of parental responsibilities and rights" explores to what extent this aspect of the Children's Act is impacting the work of social workers. Table 4.5 below summarises the responses of the participants and points to the fact that the parental responsibilities and rights aspect of the Children's Act is indeed impacting social work practice.

Table 4.5: The Role of Social Worker mediating in terms of the Children's Act 38 of 2005

Theme: The Role of Social Worker mediating in terms of the Children's Act 38 of 2005		
Subtheme	Categories	Narratives
Services to co-holders of Parental responsibilities and rights	Sharing with carers other than parents	<i>"Section 22 of the Act voluntary sharing and Section 23 interested person by court assigned."</i>
		<i>"Section 22 of the Act – the mother of the child may enter into an agreement with any other guardian."</i>
	Advice and Signposting	<i>"It assists by identifying how a parent has parental responsibilities and rights."</i>
		<i>"Section 30 would guide our services here."</i>
	Parenting plans	<i>"Many more parents are choosing to be co-holders in the sense of sharing more of the care functions."</i>
		<i>"The Act emphasises that both parents are co-holders of responsibilities and rights and helps me as a social worker and mediator to involve and incorporate both parents in parenting planning."</i>

a) Category: Sharing parental responsibilities and rights with carers other than parents.

Section 22 and 23 of the Children's Act deal with the sharing of parental responsibilities and rights with people who do not qualify for parental responsibilities and rights in terms of either section 19, 20 or 21. Section 19, 20 and 21 broadly provide for parental responsibilities and rights to be obtained by biological mothers, biological married fathers, and biological unmarried fathers. The main recipients of responsibilities and rights in terms of section 22 and 23 would therefore typically be carers other than biological parents. Section 22 allows for parental responsibilities and rights to be shared voluntarily with another person. Section 23 allows for the court to assign parental responsibilities and rights to another person. Almost all the participants in this study identified that they were offering services dealing with this type of sharing of parental responsibilities and rights. The overwhelming demand for this kind of

service reflects how the Children's Act has evidently met a need in South African society to share parental responsibilities and rights more widely than just with the biological parents.

By far most participants reported that the Act brought clarity on the sharing of parental responsibilities and rights. The participants found the guidelines of the Act useful in social work practice.

b) Category: Advice and signposting

This study is concerned with how a social worker mediating in terms of the Children's Act balances the tradition and the expectations of social work (Chapter 3) with the demands made upon the social worker by the Children's Act 38 of 2005, as amended (Chapter 2). The tradition of social work places the social worker as an advocate for the vulnerable of society and consequently makes a social worker accessible to a broad spectrum of client groups. The experience of the participants in this study reflects how social workers are seen by client groups as information hubs. In the issue of sharing parental responsibilities and rights, clients approached social workers in order to find clarity on issues of law. Social workers find themselves giving advice regarding sharing of parental responsibilities and rights with third parties. Social workers identified being empowered by the Children's Act and being able to respond to client needs. The following are typical responses on the impact of the Act on the advice that they give clients:

- *"It assists by identifying how a parent has parental responsibilities and rights."*
- *"Section 30 would guide our services here."*
- *"The Act emphasises that both parents are co-holders of responsibilities and rights and helps me as a social worker and mediator to involve and incorporate both parents in parenting planning."*

c) Category: Parenting plans

Section 33 of the Children's Act makes reference to parenting plans. In the first place, the section states that coholders of parental responsibilities and rights may enter into a parenting plan. Subsection 2 of section 33 states that coholders of parental responsibilities and rights must prepare a parenting plan where the parents intend to approach a court with the dispute.

Furthermore section 33(5) points out that the mediators of the parenting plan must either be the family advocate, a social worker, or other suitably qualified person. Participants in this study identified the link between establishing the coholders of parental responsibilities and rights, and formulating a parenting plan to support the core holders in exercising those parental responsibilities and rights. The following response by a participant neatly summarises this link:

- *“The Act emphasises that both parents are co-holders of responsibilities and rights and helps me as a social worker and mediator to involve and incorporate both parents in parenting planning.”*

4.8.2.4 Subtheme: Services resulting from referrals from court

The court has the power to refer a matter to mediation (Section 46 of the Children’s Act). This power reflects the intention of the Children’s Act to ensure that the correct dispute resolution mechanism is chosen. Research is unanimous in warning against the harm done to children (Bagshaw *et al*, 2006; Emery, 2005; De Jong, 2008). Resolving disputes through non-adversarial means is seen as contributing towards protecting children against escalating conflict. The question related to “services resulting from referrals from court” aimed to explore to what extent social workers were receiving referrals, and by implication to what extent of courts applying their minds to appropriate dispute resolution where children are involved. The responses, summarised in Table 4.6 point to the trend that the court is used to create space for both holders of parental responsibilities and rights to exercise their parental responsibilities and rights. Half the participants identified that more than a quarter of the referrals were indeed court referrals:

Table 4.6: Services to the Court in respect of the Act

Theme: The Role of Social Worker mediating in terms of the Children's Act 38 of 2005		
Subtheme	Categories	Narratives
Services to the Court in respect of the Act	Coparenting	<i>"Both parents have equal responsibilities and rights."</i>
		<i>"Both parents should take equal responsibilities for the well-being of their children."</i>
	Advice and signposting	<i>"It stipulates which factors are important when looking at parental responsibilities and rights and consequently the social worker can inform the clients about these factors and how they should implement them. For example – responsibilities and rights entails to care for a child (physically and emotionally) to maintain contact, to act as a guardian of the child and to contribute to the maintenance of the child."</i>
		<i>"Chapter 3, Section 18 and 19 clearly outlines parental rights and responsibilities and when mediating between parents the social worker can easily make reference to the Act to outline parental responsibilities and rights especially when parents dispute or do not want to adhere to their responsibilities."</i>
		<i>"The parties got to understand that the Act protects the best interest of the child."</i>

a) Category: Coparenting

The concept of coparenting despite the breakdown in the relationship of the parents is strongly supported in the literature (Skelton, 2008). Recognition of the importance of a relationship with both parents is entrenched in Section 4 of the Act. Parenting plans are a mechanism to help support parents to coparent. The responses of the participants indicate that the courts have

responded to this and are using social workers to help disputing parents clarify the mechanics of their parenting.

b) Category: Advice and signposting

Social workers mediating in terms in terms of the Act find themselves giving advice and referring clients to suitable resources. Courts have the power to refer matters to social workers for mediation, and for 'assistance'. The participants in this study are asked to give advice to clients regarding Parental Responsibilities and Rights and specifically about ensuring that coholders of parental responsibilities and rights are involved in the parenting of the child (Skelton, 2008).

4.8.2.5 Subtheme: *Impact of how parental responsibilities and rights are exercised*

The Children's Act 38 of 2005 increased the emphasis on the importance of the involvement of both parents in the parenting of a child. The Best Interests of the child are best served when a meaningful relationship is fostered between a child and the people the child regards as his/her parents. One of the means of fostering this relationship is a mediated parenting plan. The responses to this section indicated that social workers are witnessing a shift in parenting practice brought about by the implementation of the Children's Act:

Table 4.7: Impact on how parental responsibilities and rights are exercised

Theme 1: The Role of Social Worker mediating in terms of the Children's Act 38 of 2005		
Subtheme	Category	Narrative
Impact on how parental responsibilities and rights are exercised	Positive involvement of both parents	<p><i>"Both parents should take equal responsibilities for the well-being of their children."</i></p> <p><i>"I think fathers are more involved (or at least have more opportunities to be involved) in daily care and decision making about the well-being of children now."</i></p>
	Aspects of parental responsibilities and rights are highlighted	<p><i>"It stipulates which factors are important when looking at parental responsibilities and rights and consequently the social worker can inform the clients about these factors and how they should implement them. For example – responsibilities and rights entails to care for a child (physically and emotionally) to maintain contact, to act as a guardian of the child and to contribute to the maintenance of the child."</i></p>

a) Category: Positive involvement of both parents

The participants in the study were of the view that fathers, especially, are more involved in the parenting of their children. The emphasis in the views was that this was as a result of the focus on the wellbeing of the child, rather than the competing rights of the parents as are stipulated in the Children's Act.

b) Category: Parental Responsibilities and Rights are highlighted

The views of participants indicate that the structure of the Children's Act in laying out what Parental Responsibilities and Rights are and then identifying who has them, is a useful aide to social workers when working with clients. The structure allows social workers mediating to educate clients and to set a climate in mediation which makes the Best Interests of the Child

paramount, rather than the clients putting forward arguments to further their own personal interests.

4.8.3 Theme 2: Integrating mediation into social work practice

Section 3 of the questionnaire shifted its attention to the specific provision of mediation with social work practice. The Children's Act 38 of 2005, with its regulations, makes no requirement for social workers to be specially trained in mediation. Section 33 names them as appropriate to mediate, as does the other sections of the Act promoting mediation. In light of this, the responses of the participants were enlightening.

4.8.3.1 Specific training in mediation

As Figure 4.2 below illustrates, of the participants, 84,62% (n=17) had undergone specific training in mediation. All of those that had undergone training in mediation had done a basic family and divorce mediation course. Over a third (38,46%, n=17) had done a course in dealing with domestic violence in mediation, and nearly half (46,15%, n=17) had done a course in working with children in mediation. Nearly a quarter (23.08%, n=17) had done courses in advanced mediation techniques and skills, and one participant had been trained in commercial mediation on top of family and divorce mediation.

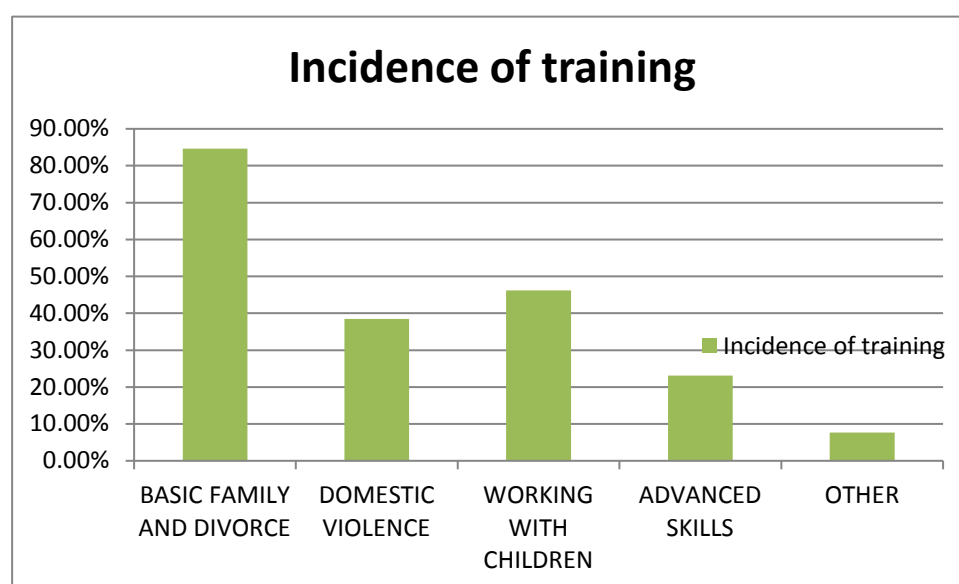


Figure: 4.2: Incidence of Training

n=17

The study by De Jong (2008) presses home the importance of appropriate training in order to conduct mediation meaningfully. In that study, social workers are identified amongst the professionals who hold appropriate skills to work with children. The findings of this research indicate that social workers feel a need to supplement their basic social work skills in order to apply them appropriately in the mediation field.

The findings indicate that, while social workers possess appropriate skills to mediate and are named in the Children's Act 38 of 2005 as being appropriate to mediate, the sample of participants to this questionnaire had supplemented those skills and the indication is that social workers mediating are attentive to maintaining a high standard in mediation.

4.8.3.2 Integration of services in organisation

The question regarding specific training was followed by a question on how mediation is integrated into the services of the organization or practice. The following themes emerged from the narratives of the participants:

The narratives given by participants pointed to an overwhelmingly positive impact of the mediation skills on the organization, even outside the formal mediation process.

Table 4.8: Ways mediation is integrated in organisation

Theme 2: Integrating mediation into social work practice		
Subtheme	Categories	Narratives
Ways to integrate mediation	General problem solving skills	<i>“This is part and parcel of working with families – to problem solve between conflicting couples/parent child/step-families etc.”</i>
		<i>“Mediation has really assisted in offering good services to clients by doing mediated parenting plans.”</i>
	Enhanced services by adding mediation to offering	<i>“100% ready for it. Give choice/educate on contact. Wither mediation or counselling and take it from there.”</i> <i>“When parents separated discussions of P/Plans and the value thereof to be part of settlement agreement is brought to their attentions with the process of mediation. When there is conflict in marriage, the value of mediation is introduced to couples with an agreement plan. With unmarried couples with child involved and separated, mediation with P/Plan made an order of court.”</i>

a) *Category: General Problem solving skills*

Mediation literature indicates that there are three broad types of mediation (Folberg, Milne & Salem, 2004). According to these authors mediation has the potential for changing existing destructive behaviours to constructive behaviours. In other words, mediation as a process has the ability for teaching skills that are applicable outside the process itself. This category that emerged from the participants’ views indicated that mediation is having a transformational

impact on organisations in that the skills required in mediation help an organisation solve its general problems in a more constructive way.

b) *Category: Enhanced services by adding mediation to offering*

The South African Council for social service professionals has articulated the number of focuses of social work practice (www.sacssp.co.za). Included in this list is casework. On top of this, the values of social worker strongly reflect a service orientation towards users of social work services. Participants in the study identified that mediation offered new benefits to users of social work practice and social workers felt empowered confidently offering a new, beneficial service to the clients.

4.8.4 Theme 3: Differentiating Mediation from other social work services

4.8.4.1 Identification of mediation cases

The research of Folb (1999), Kruk (1997) and Roberts (2008) indicate that differentiating mediation from traditional social work practice poses a problem for social workers. The problem relates to different professional expectations of social workers in mediation as compared to other forms of social work service. The delineation between different services being offered by the same organisation is an imperative if social workers are to provide an ethical, safe service. In this section, a strong subtheme emerged that was consistent with the concerns of the research: participants identified the blurring of lines in a multiservice environment as an issue. The following table summarises their responses:

Table 4.9: Blurring of lines in a multi-service environment

Theme 3: Differentiating Mediation from other social work services		
Subtheme:	Categories	Narratives
Blurring of lines in a multi-service environment	Cases identified from existing caseload	<i>“In mediation cases my role is more neutral and facilitative whilst in a counselling role, I am more directive. In mediation cases I will also always type up and distribute a formal agreement and have a follow up reviewing the agreement, whilst in counselling cases I won’t do the same. Mediation cases are often referred as ‘counselling’ cases and only after a basic assessment/initial screening, I would establish that it is a mediation case and then immediately stop with any counselling and make a re-appointment for all relevant parties to come for mediation.”</i>

a) Category: Cases identified from existing caseload

Mediation places a specific ethical duty on mediators (Hoffmann, 2000). In order to maintain impartiality the mediator is required to follow a process which treats each party equally (Mayer, 2000). Counselling and other social work services do not place the same onus on impartiality. For example, a social worker is often required to be an advocate on behalf of the client. If this distinction is not made early on, a social worker who attempts to mediate can find herself showing favour to one side or another based on the early exchanges between client and the social worker. The blurring of these lines represents the ethical risk that authors (Kruk, 1997; Roberts, 2008) identify when social workers mediate. It is clear from the responses that cases for mediation are mainly identified when they are already in the system; either from the existing caseload or from court referrals.

4.8.5 Theme 4: The nature of conflicts

Conflict as defined by Mayer (2000) features strongly in the case load of a social worker. It is for this reason that social workers are often identified as being appropriate to resolve conflict. Section 5 of the questionnaire explored the nature of conflicts that social workers are mediating.

The question asked what kind of disputes the participants mainly mediate. The following answers were given:

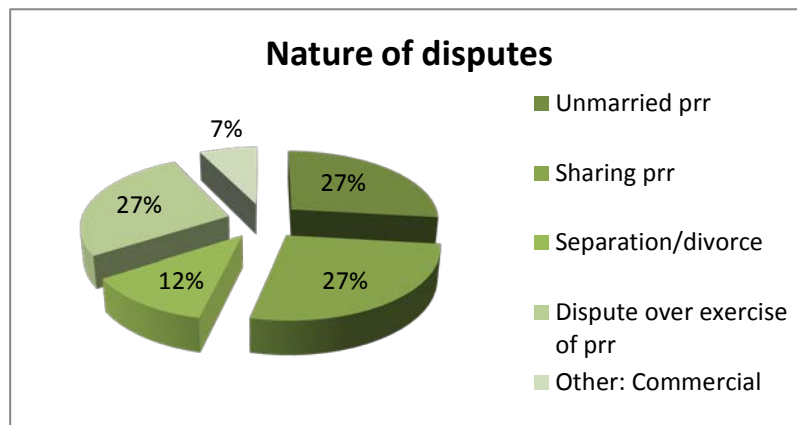
Table 4.10: Kinds of disputes

Type of disputes	Number of responses
Unmarried parental responsibilities and rights	11
Sharing parental responsibilities and rights	11
Separation and divorce	5
Dispute over exercise of parental responsibilities and rights	11
Other: (Commercial mediation)	3

n=17

These results can be depicted in a pie chart as follows:

Figure 4.3: Nature of Disputes



The areas that scored highest by participants (n=17) according to their experiences were disputes around exercise of parental responsibilities and rights of unmarried parents (27%); sharing parental responsibilities and rights (27%); and disputes over exercise of parental responsibilities and rights (27%). Mediating in matters involving separation or divorce scored relatively low (7%).

The results point to the impact of the Children's Act 38 of 2005 for unmarried parents, in particular. The services of social workers are being sought around the joint exercise of parental

responsibilities and rights and particular in a situation of unmarried parents, as indicated by Skelton (2008).

4.8.6 Theme 5: Models for mediation intervention

Traditional literature on mediation divides mediation models into three broad areas: facilitative, evaluative, and transformative (Folberg *et al*, 2004). In recent years a number of models have developed which came to be a hybrid of two or more of these traditional models. Folberg *et al* (2004) assert that it is controversial to use evaluative mediation in family matters. This view is supported by the Arbitration Act 42 of 1965, which prohibits arbitration in family matters.

Table 4.11: Factors determining choice of approach

Theme 5: Models for mediation intervention		
Subtheme	Categories	Narratives
Factors determining choice of approach	Determined by environmental factors	<i>“Skill, outcome, long-term relationships, future referrals.”</i>
	Determined by potential outcomes	<i>“What end result do you have in mind that will resolve the problem.”</i>
	Determined by social worker	<i>“The mediator is in control of the process by structuring the process and aiming at attaining a win/win situation.”</i> <i>“Type of case/matter at hand.”</i>
	Determined by service user	<i>“Recipients of service should be empowered by the end of the mediation process.”</i> <i>“It should be a dynamic process that brings about change and focus on solutions. Couple should be empowered in the process by becoming aware of their own inner abilities to solve their own conflicts and to continue to do so by themselves in future.”</i>

The findings supported literature on this issue (Folberg *et al*, 2004) . Most social workers claim to use facilitative mediation, with a smaller portion using transformative and hybrid models. One participant claimed to use evaluative mediation. The results present on a pie chart as follows:

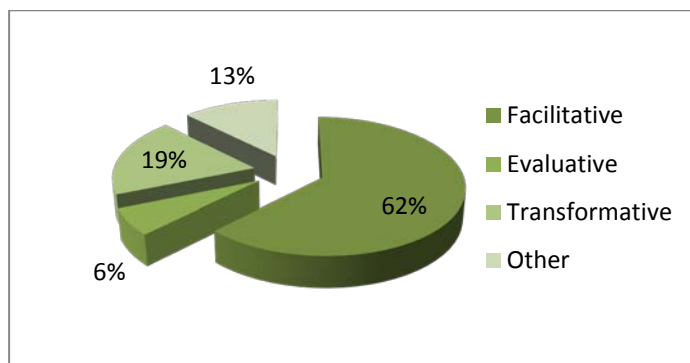


Figure 4.4: Models of Mediation

n=17

a) Category: Model determined by environmental factors

The first category which emerged related to environmental factors which determine the choice of mediation model. The social worker will assess her skill level given the complexity of the case in order to determine the way forward. Other factors are issues like the future relationship required by the clients. Where clients are required to have a relationship going forward, for example as parents, then mediation is more likely to be facilitative in nature. Where clients do not require to have a close relationship in future a more directive approach is used.

b) Category: Model determined by potential outcomes

The second category points further to the decisions that social worker mediators make with each case. The category indicates that social workers consider potential outcomes of the mediation process early in the process and the outcome of the analysis will determine which model the social worker will use to mediate the dispute. This corresponds with the features of the evaluative mediation model outlined by Folberg *et al* (2004).

c) Model determined by the social worker mediating

Some responses explicitly stated that the model of mediation used in a dispute is determined by the social worker mediating. The following statement is indicative of the philosophy associated with this preference:

“The mediator is in control of the process by structuring the process and aiming at attaining a win/win situation.”

This viewpoint strongly prefers the mediator to control the process and structure in order to give clients a framework within which to try to resolve their dispute which is in line with some features of the evaluative model (Folberg *et al*, 2004).

d) Model determined by the service user

The final category is an alternative view to the previous category. In this view the clients are totally responsible for coming to a solution and this responsibility extends as far as the clients choosing the model of mediation that they feel will best suit them. This approach would represent client self-determination in its absolute form and corresponds with the characteristics of the facilitative model (Folberg *et al*, 2004).

4.8.7 Theme 6: The mediation process

Broadly speaking, the mediation process has a definite beginning, middle and definite end (Boulle & Boulle, 1998). Various authors delineate further tasks within the mediation process. Typically, the initial phase of the mediation process involves intake and screening. An important aspect of this screening is an assessment of the appropriateness of the case for mediation. Issues such as mental health, and domestic violence as excluding factors should be picked up at intake. The democratic nature of mediation means that a failure to pick up risks of harm at intake could perpetuate abuse in the process and leave a victim more vulnerable as a result of the mediation process.

Participants (n=17) were asked to identify which tasks they typically implement within the process. As can be seen in Figure 4.4 below, the areas that scored highest were 1) that an agreement is drafted by the mediator (12 or 70,59%); 2) that the clients are invited to sign the

final agreement (12 or 70,59%); and 3) that a mediation agreement is entered into at the outset (11 or 64,71%). The task that scored the lowest was the debriefing of the mediator (3 or 17,65%).

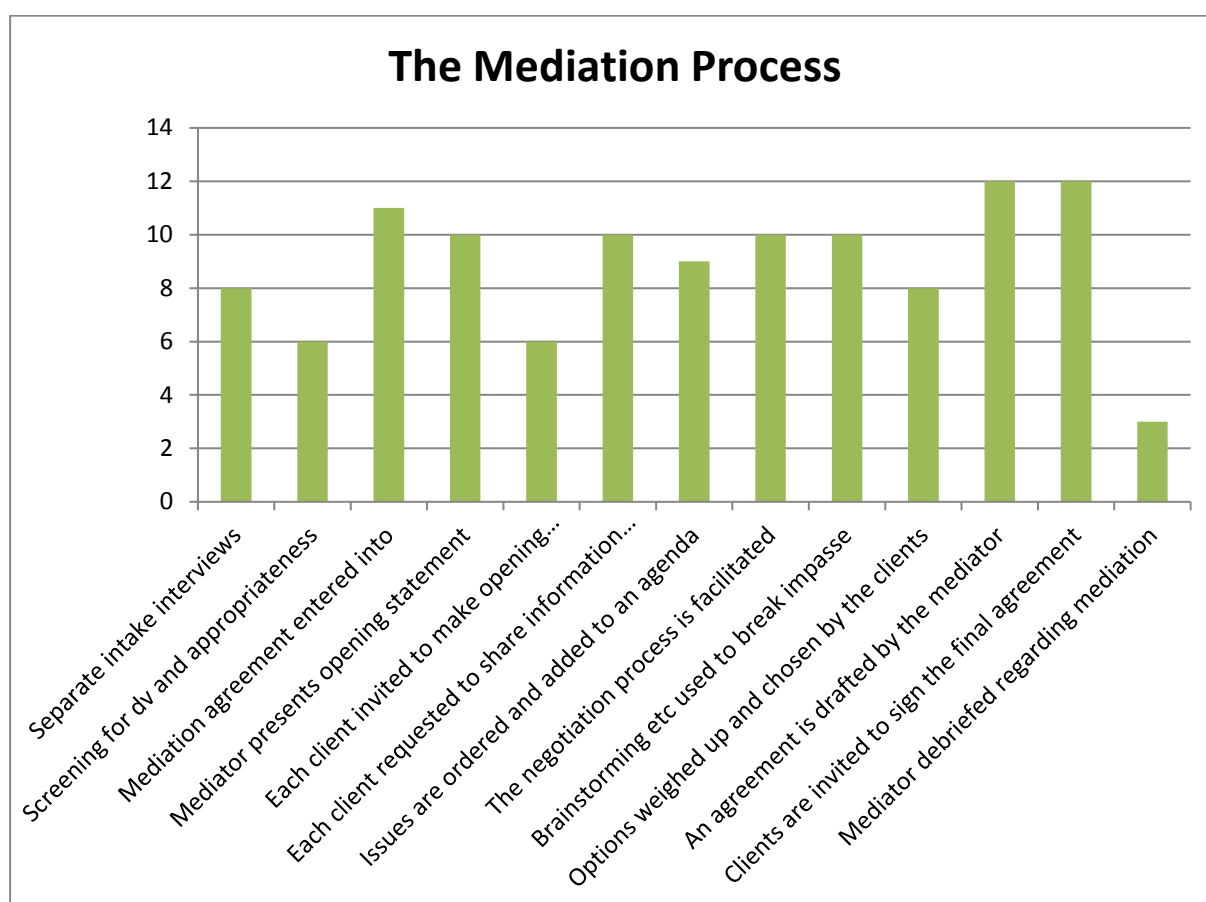


Figure 4.5: The Mediation Process

The striking fact, when these results are represented as a bar graph, is how strongly social workers across South Africa and in different agencies agree on the mediation process. The process is not a formal one and the framework for the question was based on the work of Boulle and Boulle (1998), however, it can be said that the social workers surveyed as part of this study followed materially the same process.

The lowest scoring aspect related to the support and supervision of the social worker mediating. This response might have a number of root causes. It could be that this is a symptom of a wider problem in that social workers in general are not being adequately supervised because of caseloads, or that there is not sufficient mediation expertise available to offer such support.

4.8.8 Theme 7: Child Participation

The Children's Act 38 of 2005 requires that the children participate in the decision-making for matters that affect them (Section 10). The regulations require that children be consulted according to their age, state of development and maturity, during the process of deciding a parenting plan, and that they be informed of the plan after its conclusion. This requirement in the Children's Act 38 of 2005 mirrors the United Nations Convention on the Rights of the Child of 1989 and the African Bill of Rights of the Child of 1995.

4.8.8.1 Involvement of children in mediation

While involvement of children is a requirement in the Act, it would seem from feedback that the Act is not being fully implemented and that there is space for discretion regarding the mechanics of mediation. This is borne out by the responses.

Most of participants (n=17) indicated that they involve the child, while some (31%) indicated that they sometimes involve a child. The results present on a pie chart as follows:

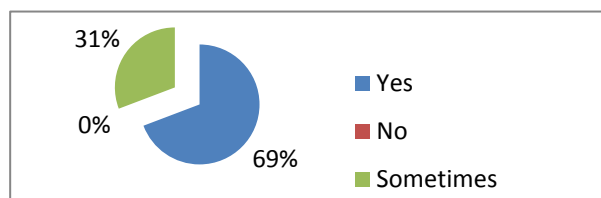


Figure 4.6: Involving a Child in Mediation

n=17

4.8.8.2 Criteria employed to determine participation of child

The study gave participants the opportunity to articulate what criteria they use for inclusion of the child in the mediation process and every participant responded that the age stage of development and maturity was an important factor. Participants gave a number of other criteria such as that the child be over the age of seven, that the child be over the age of 10, but these responses do not seem to be significant as they were not repeated by other participants.

The themes that emerged from the responses can be summarised as follows, supporting the notion that the age, stage of development and maturity of the child are considered in making the decision, as is stipulated in article 12 of the United Nations Convention on the Rights of the Child of 1989:

Table 4.12: Determining when it is appropriate for a child to participate

Theme 7: Child Participation		
Subtheme	Categories	Narratives
Determining when it is appropriate for a child to participate	Stipulations of Act	<p><i>“Age; developmental stage; bond with parents.”</i></p> <p><i>“Depends on age and maturity level of child; prefer to observe parents interacting with child Age and maturity.”</i></p>
	Able to verbalise opinion	<p><i>“If the child is old enough to verbalise his/her feelings and thoughts and can participate meaningfully in the mediation process then the child should be invited to the session.”</i></p> <p><i>“I always meet the children as well so I get a feel of who they are. If they are of such an age that they can verbalise their opinion, I hear them. If there is high conflict between the parents, and the children are too young, I employ the services of a child specialist to do an assessment and give recommendations. If the parents are amicable and a general sense of focusing on the children’s best interest prevail, I do not call for assessments.”</i></p>
	Child and environmental factors	<p><i>“Maturity of the child, is the child developmentally capable of participating? Over the age of 7. Usually if there isn’t hostility which could affect the child. If the child is highly anxious or fearful I would not include them. Criteria found in Section 6, 7 and 10.”</i></p>

4.8.8.3 Phases when child participates in process

Participants were asked to identify when in the course of the process children are consulted. The results are presented in Table 4.17. The strong bias was that the children are consulted during the process and at the end of the process. This would reflect the requirements of regulation Children's Act 38 of 2005 and supports that social workers, when they consult children, consult children in a way that complies with the expectations of the Children's Act 38 of 2005.

Table 4.13: Child participation in phases of process

Participation	Before process	During process	End of process	Total
Number of responses	1	9	8	18

n=17

4.8.9 Theme 8: Domestic violence

Certain critiques of mediation raise concerns that mediation does not protect vulnerable parties to the mediation. This weakness of mediation stems from the value of self-determination that most mediators and mediation processes hold dear (Haynes, 1994; Roberts, 2008). Social work values are strongly based on advocacy and the protection of vulnerable members of society and an awareness of certain shortcomings of mediation is critical to the ethical service delivery in the social work field (Johnson, Saccuzzo & Koen, 2005).

4.8.9.1 Screening for domestic violence

Screening for domestic violence is a sensitive process as a perpetrator in a domestic context is able to exercise a very high level of control. For example, it is not unusual for telephone calls to be listened into and for a victim to be coached into "appropriate responses". A suitable domestic violence screening protocol should mitigate against a possible perpetrators' control in order to keep the victim safe and for an accurate assessment to be made (Argiroff, 2012).

One question in the questionnaire addressed how domestic violence is dealt with by social workers mediating. The responses, in Figure 4.5 below, indicated that there is a serious danger to vulnerable parties in the mediation process in the way it is being exercised at the moment. More than a third (35,29%) of participants (n=17) indicated that they have no protocol, as is suggested by Argiroff (2012). If one added what would be considered inadequate provisions (for example if neither party objects to the process, when children have been removed) one achieves 70,59% responses!

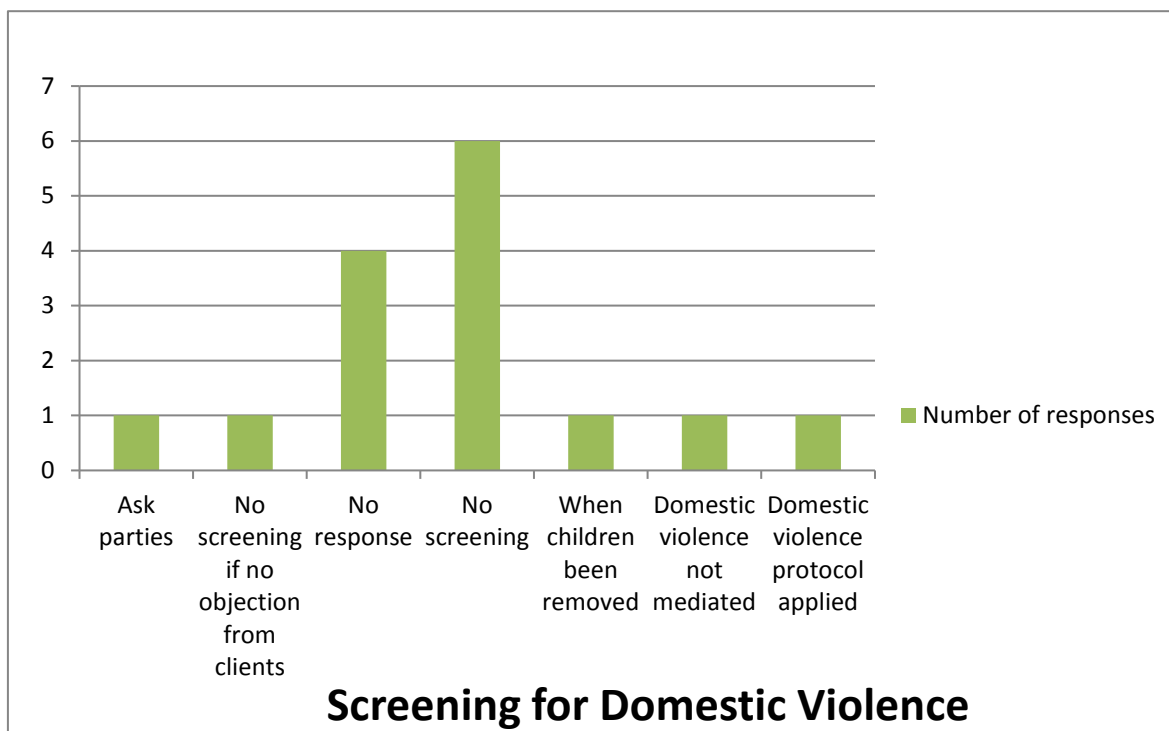


Figure 4.7: Screening for Domestic Violence

n=17

For the questions related to the use of screening and the process followed where an allegation of domestic violence is made there was the greatest number of unanswered questions. This seemed to underline the uncertainty social workers feel when dealing with Domestic Violence in the context of mediation.

Table 4.14: Insufficient screening

Theme 8: Domestic violence		
Subtheme	Categories	Narratives
Insufficient screening	No routine screening	<i>"I have no experience with this."</i>
		<i>"Would need to check with a mediation expert."</i>
		<i>"I have found that parents can use allegations against one another as weapons."</i>
		<i>"No answer."</i>
	Mediating parallel to Legal protection mechanisms	<i>"Do application for a protection order, when possible and allowed, will offer mediation help to solve or get agreement."</i>
		<i>"The allegations have to be investigated and reported to the appropriate people where necessary. The case would be referred to directly to court and the social worker will explain the reason therefore."</i>

a) Category: No routine screening

The strongest critique of mediation relates to client safety. Social work as a profession is firmly founded on principles of client-centredness and if mediation contributes to doing harm to clients it represents a threat to social work values. The threat to safety is raised in literature with regard to the ongoing risk of Domestic Violence in the midst of mediation (Ellis & Stuckless, 2006). Where there is a disproportionate balance of power in a relationship the weaker party cannot be expected to negotiate for their own interests. The responses to this question indicate that this risk is real in South Africa. While other countries require assessments of safety of different levels and success, South Africa has no routine assessment in place determining suitability for mediation based on domestic violence risk. This is compounded by the fact that social workers themselves are not necessarily putting such safety measures in place.

b) Mediating parallel to legal protection mechanisms

A solution to the problems associated with mediating under allegations of domestic violence was identified in some of the responses. In order to afford clients a measure of protection, some social workers surveyed, used the protection granted by the family court system to protect clients. Having achieved this safety for the client, the social worker will continue to mediate.

This solution highlights again the dilemmas faced by social workers mediating as is stated by Kruk (1997). A social worker who helps a client acquire a Protection Order before mediating in a matter has been true to social worker values but has undermined the requirement to be impartial in dealing with the clients.

4.8.10 Theme 9: Working with other professionals

Conflict is multifaceted. Roberts (2008) identified different kinds of conflict and when one deals with family conflict falling within the scope of the Children's Act 38 of 2005, these different kinds of conflict work together creating a complex tapestry. In a professional environment conflict crosses boundaries and involves various professionals.

4.8.10.1 Professionals working in mediation field

As a result, mediation is used as a conflict resolution tool by various professions (Haynes, 2004). Different professions have developed different typologies around mediation and dispute resolution that use the term mediation. The study explored the extent to which social workers are involved with other professionals in resolving conflict. The question was also interested in how social workers manage diverging assumptions and approaches in conflict resolution.

The participants identified court officials and the Office of the Family Advocate as the most common point of contact with other professionals (32,26% of participants). This was closely followed by contact with lawyers (29,03%). Non-government organisations, other social workers, psychologists, teachers, nurses and doctors were also identified as professions which became involved in the mediation process. Illustrated in a pie chart, these figures present as follows:

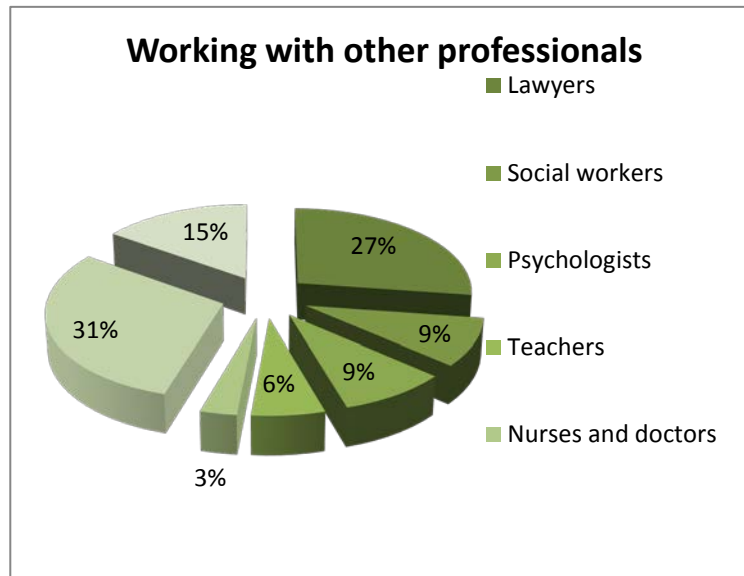


Figure 4.8: Working with other professionals

n=17

4.8.10.2 Subtheme: Functions of professionals in mediation

The responses to the question dealing with the function of these relationships pointed to the necessity for the outcomes of mediated agreement to be either made an order of the court, or endorsed by the courts or the Office of the Family Advocate. The responses illustrated the high degree of collaboration edits required of a social worker mediating:

Table 4.15: Need for collaborating with other professionals

Theme 9: Working with other professionals		
Subtheme	Categories	Narratives
Functions of other professionals	Legal advice/legal representation	<i>“Attorneys – divorce cases that need mediation.”</i>
		<i>“Presiding Officer – make P/Plan order of Court.”</i>
		<i>“Presiding Officer when Form 2 application.”</i>
		<i>“Court officials bring matters to our attention through court orders. DSD social workers provide us with detailed reports.”</i>
		<i>“Clerk of the Court facilitating paper work.”</i>
		<i>“Presiding Officer endorses the parenting plans.”</i>
		<i>“Lawyer – client consults re summary of proposals.”</i>
		<i>“Referrals in cases where Protection Orders are needed or when Parenting Plans need to be made an Order of Court. Where clients cannot reach an amicable agreement with the social worker they are referred to the Family Advocates Office.”</i>
	Other professionals, incl health and education	<i>“Nurses and Doctors (medical duties) Teachers (reports cases from school) and lawyers help dealing with legal representation.”</i>

a) Category: Legal advice/legal representation

The social worker mediators surveyed in the study have most contact with the legal profession when dealing with other professionals. The responses showed two kinds of relationships: on the one hand, mediators referred letters to legal professionals for legal work to be done on a case, and on the other hand, legal professionals and courts refer cases to mediators.

b) Category: Other professionals, including health and education

Other professionals were also identified as important to social workers providing a mediation service to clients. Mediators indicated that they collaborate with these other professionals in order to obtain medical records and to understand the educational needs of children help clients formulate the best possible outcome in the mediation process.

4.8.10.3 Subtheme: Advantages of working with other professionals

Participants identified working collaboratively as a strong advantage in the mediation field. Participants identified the value of the technical input of other professionals on the mediation process, and the value of learning from other professionals:

Table 4.16: Advantages of collaborating with other professionals

Theme 9: Working with other professionals		
Subtheme	Categories	Narratives
Advantages of collaborating	Mutual learning	<i>“It provides information for the process of mediation. Of working as co-mediators, it provides a different view which compliments the process. You learn about other disciplines. It serves as networking as it generates referrals.”</i>
		<i>“It makes the process easier and allows for production of legal documents.”</i>
		<i>“Teamwork, assistance is received where the social worker is struggling. Knowledge and expertise are shared.”</i>
	Balancing of power	<i>“Different perspectives and strengths are brought together. Mediation deals with high conflict situations which are easier to contain if there are two professionals co-mediating. It balances the power sometimes i.e. if one of the clients has a strong personality, he/she is less likely to walk all over the mediator if there are two mediators.”</i>
	Better service to clients	<i>“Social workers can’t do everything. Sometimes people are at difficult stages of the separation/divorce/dealing with adultery and needs therapy before being able to deal effectively in mediation.”</i>

a) Category: Mutual learning

While authors (Kruk, 1997; Roberts, 2008; Folb, 1999) warn against the risks of conflicting typologies, mediators identified the collaborative aspect of working with other professionals as a major strength. This was especially strongly felt in the mutual learning aspect of working together. Rather than the typologies getting in the way of professional practice, social workers

feel challenged by other professionals and are able to upskill themselves in the conflict resolution discipline. At the same time, social workers mediating are in contact with other professionals and the social work profession has the opportunity to influence perspectives of other professionals. The following are two responses which summed up the mutual learning aspect powerfully:

“It provides information for the process of mediation. Of working as co-mediators, it provides a different view which compliments the process. You learn about other disciplines.”

“Teamwork, assistance is received where the social worker is struggling. Knowledge and expertise are shared.”

b) Category: Balancing of power

The theme of power is central to mediation. One of the roles of the mediator is to ensure that power is balanced in a way that both parties can negotiate in their own interests. If this is not achieved the mediator risks steam harm to one or both of the clients. The participants reported that by mediating with another professional they hoped to bring a balance of power, especially where one client would seek to influence the mediator as well as the other client. The following response was representative of this view:

“Different perspectives and strengths are brought together. Mediation deals with high conflict situations which are easier to contain if there are two professionals co-mediating. It balances the power sometimes i.e. if one of the clients has a strong personality, he/she is less likely to walk all over the mediator if there are two mediators.”

c) Category: Services to clients

A further benefit that was identified by participants is the added value to the service to clients when different professionals collaborate. One of the strong benefits to the client is the aspect to legal services through the network of the social worker. The social worker is very accessible to the client to the agencies in a way that the legal profession, for example, is not. Introductions by the social worker to legal services adds value to the client who enjoys the full range of services. The following response indicates that legal referrals are not the only value-add that clients receive. Clients are also referred for therapeutic services where applicable:

“Social workers can’t do everything. Sometimes people are at difficult stages of the separation/divorce/dealing with adultery and needs therapy before being able to deal effectively in mediation.”

This finding corresponds with the views of Kruk (1997) with regards to the responsibility of the social worker to work with other professionals.

4.8.10.3 Subtheme: Challenges in working with other professionals

Working closely with other professionals is not without its challenges. Participants identified frustration at the different goals and values of other professions. They also identified that these differences meant that collaborating is often time-consuming and/or bureaucratic. The low status of social workers in the eyes of other professionals was identified as another significant problem in dealing with other professionals.

Table 4.17: Challenges in working with other professionals

Theme 9: Working with other professionals		
Subtheme	Categories	Narratives
Challenges in working with other professionals	Blurring of roles	<i>“Meddling in the process.”</i>
		<i>“Some may undermine, they may take time to do their duties.”</i>
		<i>“Adversarial stance taken by Attorneys; unethical practices; lack of co-operation; attorneys infringing in our field by working with children.”</i>
	Different professional typologies	<i>“Biased beliefs about certain professions, different communication systems and channels. A different in service goals and values of various professions.”</i>
		<i>“Working in child protection, I have only ever had difficulty with lawyers who wish to interpret the Children’s Act.”</i>

The following categories illustrate some of the challenges in dealing with other professionals:

a) Category: Blurring of lines

The blurring of professional boundaries was identified by participants as a challenge when dealing with other professionals. Mediation by nature it is not as formal as other legal dispute resolution mechanisms and much of the frustration of social workers was directed at attorneys whom they felt overstep professional boundaries and assert an adversarial approach to dispute resolution. An example given was of attorneys interviewing children as part of a legal process whereas a social worker would be considered the appropriate professional to undertake such an interview:

“Adversarial stance taken by Attorneys; unethical practices; lack of co-operation; attorneys infringing in our field by working with children.”

b) Category: Different typologies

Participants supported the view of Kruk (1997) and Folb (1999) in identifying different professional typologies as a difficulty in working across different professional boundaries. Different professions give different interpretations to sections of the Children’s Act and have different practices for dealing with clients and other professionals. The tension created in working with other professionals is evident in the emotion of the following response:

“Working in child protection, I have only ever had difficulty with lawyers who wish to interpret the Children’s Act.”

4.8.11 Theme 10: Social Worker experience of conflict and mediation

The Children’s Act 38 of 2005 has placed a social worker in a position of prominence. Part of the recognition of the social work skills has been in identifying a social worker as the appropriate professional to mediate in many different types of family disputes.

4.8.11.1 Use of social work skills in mediation

The experience of social workers mediating, with special reference to skills and ethical dilemmas was explored.

As can be seen from Figure 4.8, the skill of active listening was identified as the most commonly used skill (9 or 52%) for a social worker mediating. This was followed by an ability to facilitate negotiation (6 or 35%), and summarizing (6 or 35%).

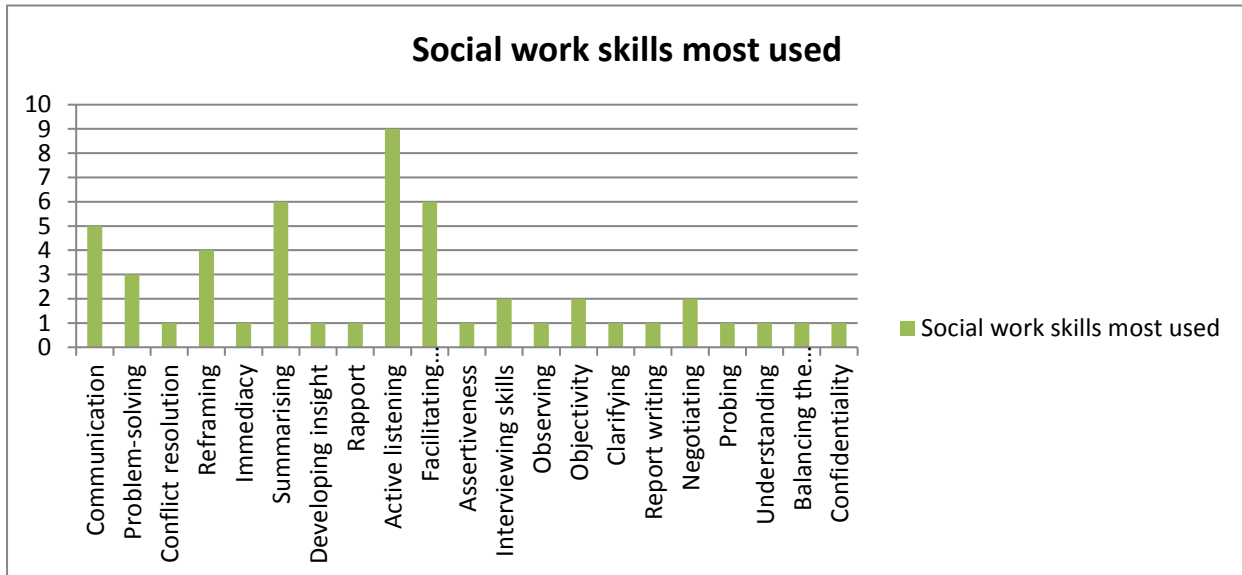


Figure 4.9: Social worker skills most used

n=17

4.8.11.2 Compatibility of mediation with social work

Social workers were of the opinion that mediation is strongly compatible with social work, as the distribution in the graph below illustrates. The concentration of responses is towards the "absolutely compatible" end of the range, with only one participant giving a score of 5, in the middle of the range:

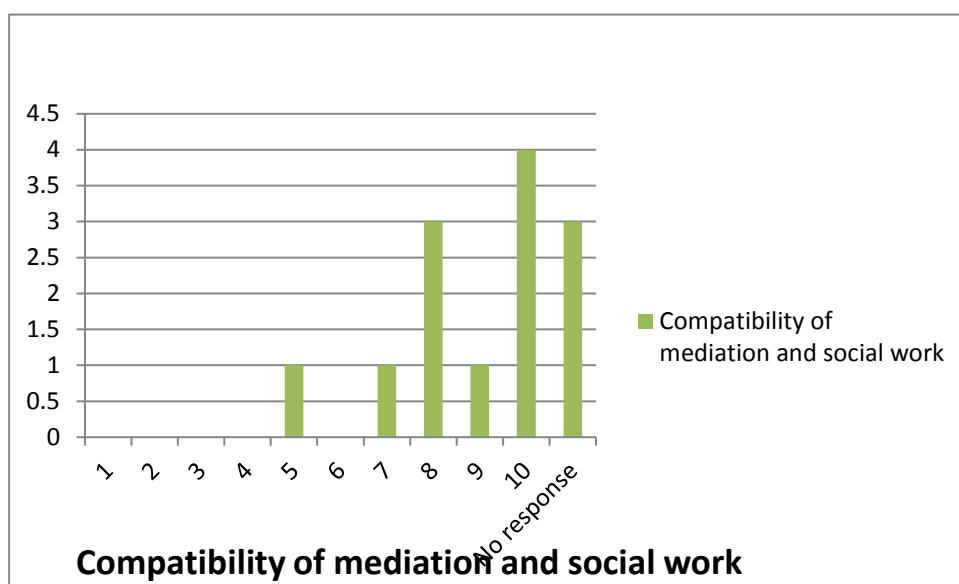


Figure 4.10: Compatibility of mediation and social work

n=17

4.8.11.1 Subtheme: Ethical dilemmas created by social work

With these preliminary insights as a backdrop, ethical dilemmas experienced in mediating were explored.

Some participants felt that mediation created ethical dilemmas for them. The nature of social work tends to advocate for vulnerable individuals and groups, and a comment was made that mediation limits the mandate of a social worker and does not allow for intervention where a social worker would normally be competent to intervene. The boundary between the mandate as mediator and the professional mandate creates a dilemma, especially where domestic violence is suspected or societal values conflict with outcomes of the mediation process (Haynes, 1994).

Table 4.18: Ethical Challenges

Theme 10: Social Worker experience of conflict and mediation		
Subtheme	Category	Narrative
Ethical challenges	Maintaining appropriate boundaries	<i>“As a social worker one tends to empathise more with clients and respond to emotional needs especially where there are children involved. It is difficult to remain emotionally detached and not wanting to do the right thing.”</i>
		<i>“As a social worker you end up feeling empathy with the parties. Social workers end up being tempted to counsel the parties.”</i>
		<i>“Social worker resort to counselling and empathises with the parties and also investigates to verify information.”</i>
	Cultural norms	<i>“Where traditional and culture customs and beliefs are of such an extent that it is illegal or goes against a person’s individual rights.”</i>

a) Category: Maintaining appropriate boundaries

A professional social worker delivers a broad range of services to clients (www.sacssp.co.za). An earlier question in the questionnaire established that most social workers mediating operate with in a casework scenario. Participants in the study identify the challenges that this created for them the switch from one function to another creates ethical dilemmas. One participant reported that her professional instinct was to understand the emotional experience of the client and found it hard in mediation as emotions were not as important because the focus shifted to the whole system rather than the experience of one part of it. Maintaining the appropriate ethical boundaries between different services offered by the same agency and often the same person is strongly felt ethical challenge. These findings emphasise the need for mediators to be familiar with the ethical principles articulated by Hoffmann (2000).

b) Category: Cultural norms

Client self-determination is a broadly accepted value in social work and mediation (Hoffmann, 2000). According to this principle clients, properly supported, are able to determine the best outcomes for their situation. Mediation in high conflict situations tests the resolve of social workers in implementing client self-determination. When a dispute is placed in the hands of the clients it is possible for cultural mores to play out in the solution. Sometimes the solution is contrary to the values of the social worker or, indeed, the laws of the country. The ethical dilemma for the mediator is created by the tension between client self-determination influenced by cultural norms and the values of the social worker and legal frameworks. The mediator is put in the position where she must decide to what extent she intervenes in the content of the process (Boulle & Boulle, 1997).

4.8.11.2 Subtheme: Benefits for clients of social workers mediating

Participants identified the various benefits of social workers mediating, the most prominent being the improved communication between the disputing parties. The saving of time and money was also identified as strong benefits of mediation:

Table 4.19: Benefits for clients of social workers mediating

Theme 10: Social Worker experience of conflict and mediation		
Subtheme	Categories	Narratives
Benefits of social workers mediating	Time, money, be heard	<i>“Long-term relationships, saving money and time, being heard.”</i>
		<i>“They decide quicker due to the fact that they have to pay for the service.”</i>
		<i>“It helps them come to an agreement sooner because of the cost.”</i>
	Reduce conflict	<i>“Reduces adversarial climate which should result in a better outcome.”</i>
	Forum for conversations	<i>“The power and healing of good, open and comprehensive conversation are often demonstrated through mediation. Couples who had not had a proper conversation in years can be assisted to have a constructive conversation in mediation. Mediation offers the opportunity to clarify misunderstandings and also to emphasise common grounds and by doing so help to build relationships between co-parents or other involved parents.”</i>
		<i>“Mediation is a positive alternative to litigation. Mediation is done by a third party who is neutral and who can assist both parties to resolve their issues without conflict and reach an amicable agreement which draws attention to specific needs and interests of their children. Divorce mediation aims at reducing conflict, promoting communication and fostering co-parental responsibilities.”</i>

a) Category: Time, money, be heard

The cost of mediation was identified by participants as one of the benefits. Participants in the study appreciated the fact that the cost was a factor for clients and therefore that the clients were

inclined to seek a solution more quickly in order to curb the total cost of the process. Mediators saw this factor as helping resolve disputes compared to services that are offered for free and where the client does not have the same financial motivation to find a solution. At the same time it was pointed out that the fact that a social worker helps with this process means that it is cheaper than a process handled in court with each party being represented by an attorney and/or advocate.

b) Category: Reduce conflict

The views of participants were that the reduction of conflict results in a better outcome. This supports the purpose of mediation, which is to help disputing parties reach a solution which both find agreeable (Mayer, 2000). This is in sharp contrast to an adversarial process which relies on strong arguments and cross-examination, culminating in a determination by a presiding officer. The different nature of mediation ensures that the process itself does not contribute towards the escalation of conflict and the chances that the disputing parties will have some sort of relationship after the mediation process is much greater than if an adversarial process had been followed.

c) Category: Forum for conversation

Silence is a common feature between conflicting parties. In the silence alienation and dehumanisation grow and prospects of finding solution shrink. Social workers contribute strongly in the mediation process by creating a forum for conversations that otherwise would not have occurred, either between the parties independently, or in the adversarial process of the court. The skills of the social worker are brought to bear in creating an environment where healing is given in the best chance. One participant in the study put it as follows:

“The power and healing of good, open and comprehensive conversation are often demonstrated through mediation. Couples who had not had a proper conversation in years can be assisted to have a constructive conversation in mediation. Mediation offers the opportunity to clarify misunderstandings and also to emphasise common grounds and by doing so help to build relationships between co-parents or other involved parents.”

All participants felt that there was no intervention better than mediation to resolve conflict that they could think of. This represents a strong stamp of approval from the profession. One participant put it this way:

“I am a strong believer that mediation is the answer for all family/couple conflicts.”

4.9 CONCLUSION

The aim of this study is to explore the experiences of social workers mediating in terms of the Children’s Act 38 of 2005. This chapter has presented the findings of that study.

The study determined the social work service context within which mediation is taking place and went on to explore the impact of the Children’s Act on the social work service. The study focused on the areas of service of mediator social workers as determined by the Children’s Act and then moved onto how mediation is incorporated into practice.

The study explored the nature of conflicts that social workers were called on to mediate and the methods that social workers chose to use to intervene.

The issues of domestic violence and child participation in the mediation process were expanded as issues that a social worker was called to grapple with as a mediator.

Finally issues of compatibility with the social work profession and working with other professionals was explored in order to complete the detailing of the experience of the social worker mediating in terms of the Children’s Act 38 of 2005.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

This study originated from the identification of a gap in the literature to support social worker mediators in South Africa. The aim of the research was to provide an insight into the role of social work mediating in terms of the children's act 38 of 2005. This chapter will present the conclusions and recommendations based on the findings of the previous chapters, thereby meeting the fourth objective of this study. The recommendations will serve as guidance for future research and support of social workers mediating in terms of the Act, based on the experiences and views of social workers.

5.2 CONCLUSIONS AND RECOMMENDATIONS

The following conclusions and recommendations were drawn from the findings of the study.

5.2.1 The role of the social worker mediator

The findings of the study indicate that casework is the most common social worker service offered by social workers mediating. A smaller number also offered community work, group work, and case management. The SACSSP defines casework as "a method of direct practice with in social work and typically being conducted on a face-to-face basis with individuals, couples and/or family" (www.sacssp.co.za). It is not surprising, then, that casework is highly represented amongst mediators. Family mediation is most often conducted face-to-face and involves the client group that social workers generally deal with.

The conclusion that can be drawn from this is that mediation falls within a casework environment for a social worker. The nature of mediation means that there is strong compatibility between the social worker experience of casework and mediation.

A further conclusion that can be drawn from the findings is that very little social work research is being done into mediation. Social work benefits from social workers in practice conducting

research, and this appears not to be occurring in the field of mediation. This is lamentable as mediation is a new field in which social workers are seen as being in the vanguard.

Recommendations:

- Mediation should be promoted as an area of practice for social workers. It should be encouraged as a skill and methodology falling within the casework framework.
- Social work training should incorporate mediation as a methodology which will be required by social workers conducting casework.
- research into mediation as a social work methodology must be actively promoted.

5.2.2 The implementation of the Children's Act 38 of 2005

Participants strongly identified services to unmarried fathers as a consequence of the new Children's Act 38 of 2005. Specifically, participants referred to helping unmarried fathers apply the test outlined in section 21. An understanding of section 21 seems to be critical as participants also identified that they are required to give clarity on parental responsibilities and rights of unmarried fathers.

The issues of parental responsibilities and rights were strongly highlighted in the findings. The Children's Act shifted definitions of parenting, especially where unmarried fathers are concerned. The findings indicated that social workers are an important resource for unmarried fathers and other co-holders of parental responsibilities and rights to understand what those parental responsibilities and rights are. The findings highlight the experience of social workers as being recognised by clients as an important source of information in the community.

The conclusion that can be drawn from this feedback is that clients identify social workers as a meaningful, trustworthy source of information. Social workers are viewed as being up to date on the law and in a position to help clients.

A further conclusion is that the changes in the Children's Act, especially regarding parental responsibilities and rights of unmarried fathers, has had an impact on those clients lives. As the client has been affected, the nature of social work cases has been affected.

Recommendations

- The role of a social worker as an advocate and source of information should be marketed to members of the public so that those seeking this information can find it readily;
- Social workers are to keep abreast of the law, especially with respect to exercising of parental responsibilities and rights. This can be achieved by social workers giving some attention to the law in the course of their continuing professional development;
- The addition of mediation services, which flow out of the Children's Act 38 of 2005, should be factored into caseload management of social workers by managers and supervisors.
- Greater effort must be made by the legal system to identify cases that require mediation in terms of the Children's Act, and for those cases to be referred to social workers mediating in terms of the Act.
- As parents seek to get more involved with the parenting of their children, services to support this desire should be increased in the community. Parenting courses for fathers should be promoted by social workers as part of the response to that Children's Act 38 of 2005.

5.2.3 Integrating mediation into social work practice

The findings of the study indicate that, even though social workers are not required to do specific studies in mediation, social workers mediating in terms of the children's act tend to be trained in family and divorce mediation. Furthermore, social workers mediating seemed to identify a need for specific training in working with children and domestic violence. The findings also pointed to the fact that social workers experienced multiple benefits in requiring mediation skills, including benefits outside the mediation process.

The conclusion that one can derive from this concurs with that of De Jong (2008), where she makes a strong point that mediators mediating disputes involving children should have specialised training. This training is irrespective of the legal standards set that social workers need not receive further training in order to mediate.

Recommendation

- Social work agencies should ensure that mediation training is constantly available for social workers seeking to mediate in terms of the Children's Act.

5.2.4 Differentiating mediation from other services

The difficulties with managing mediation within a multiservice environment were highlighted in the responses to the questionnaire. Most mediation cases are identified within the existing caseload of an organization, followed by intake and court referrals. The challenge that this presents is the expectation that were created at intake and how these are managed.

The conclusion can be drawn that contracting has already occurred with the majority of clients. Mediation may not have formed part of that contracting and confusion, on the part of the client and the social worker, is a risk. This risk is mitigated where cases are identified at intake and appropriate guidelines can be set with clients and social workers at the outset.

Recommendations:

- Even social workers not mediating should have knowledge of mediation in order to assess their own caseloads for mediation referrals;
- Intake workers must be fully briefed on the requirement to mediate in certain circumstances and know how to refer such cases;
- Clear contracts should be entered into with clients so that the client and social worker are clear as to the service that will be offered and received;
- Strong partnerships of social work mediators with courts and other statutory bodies would aid the delivery of service to clients, ensuring smooth referrals from court.

The findings uncovered the fact that, despite the benefits to the clients, and the preremptory nature of mediation, clients are required to pay for mediation services. This aspect was picked up in distinguishing mediation from other services being offered by social work agencies.

The conclusion that can be drawn from this is that the funding given to agencies where mediation is taking place, does not extend to the mediation part of the work done at the agency.

Recommendation

- Government funding of mediation services would ease the burden on the client and make it easier for clients and social workers to comply with the compulsory nature of mediation, such as laid out in Section 33 of the Children's Act.

5.2.5 The nature of conflicts

The Children's Act names social workers as appropriate mediators in disputes between unmarried parents and disputes regarding the sharing and exercising of parental responsibilities and rights. The findings found that the nature of disputes being mediated by social workers were congruent with the expectations of the Children's Act. Disputes regarding separation and divorce featured relatively lightly in the nature of disputes.

The conclusion that can be drawn from this is that a social worker mediating in terms of the Children's Act should expect a large part of his or her caseload to constitute mediating in disputes between unmarried parents and/or the sharing of parental responsibilities and rights.

Recommendation

- Social workers must acquaint themselves with the terminology in the Children's Act 38 of 2005 regarding parental responsibilities and rights. This can be achieved through ongoing professional development (CPD) and reading by the social worker.

5.2.6 Models for mediation intervention

The findings regarding models of mediation supported literature in that most social workers indicated that they use facilitative mediation techniques. The participants also indicated that they use a measure of flexibility in determining the exact model, depending on the needs of the clients.

The conclusion that can be drawn from this is that social workers have a sensitivity to the needs of the client and understand that the mediation process has a strong element of client self-determination.

Recommendations:

- Social workers should continue to be educated in different mediation models.
- New models should be explored that suit the particular client groups that social workers find themselves working with. This is particularly true of social workers in a traditional African setting.

5.2.7 The mediation process

Social workers surveyed indicated that they strongly follow the mediation process as contained in literature. The exception was the task of debriefing the mediator regarding the mediation once the process has been concluded.

The conclusion that can be drawn from this is that social workers mediating have a good sense of what a mediation process entails. However, the mediator is not being debriefed. The significance of this is pointed out by Fisher (2007), who points out that the nature of mediation requires that mediators are well supported by their support network. That social workers mediating are not debriefed is concerning as they require support to remain effective in their role as mediator.

Recommendations

- Social workers mediating must be given the opportunity to debrief following mediation sessions. This can be achieved by supervision groups of mediators, or in the regular supervision sessions within the agency.
- Social work managers must be particularly mindful of the work-life balance of mediators in order to ensure a sustainable service.

5.2.8 Child participation

While the Children's Act requires children to participate in matters involving them, findings suggested that this occurs in most of cases. Some of the participants indicated that they sometimes involve children. Literature would indicate that this tension is universal. De Jong (2008) articulates a number of situations where she would recommend involvement of the child and others where she does not. The research cites the United Nations requirement and draws

attention to the tension between the requirement to have children participate in the reality of family dynamics and ethics.

The conclusion that can be drawn from the findings is that social workers are making their own decisions regarding child participation, and these decisions are being based on factors that social workers are identifying themselves.

Recommendations

- Social workers must be trained to interview children as part of the mediation process. Most social workers will interview children in this environment, so they must get specific training on how to do this.
- Better criteria for inclusion must be developed by social work agencies so that social workers are aided in making consistently good decisions.
- Mediation models that comply with the Regulations must be developed by researchers to help mediators with when and how children to participate.

5.2.9 Dealing with domestic violence

The findings of the study confirmed the fears of international authors that domestic violence is not adequately considered in a mediation process. The findings found that screening practices of social workers mediating in terms of the Children's Act leave clients who are victims of domestic violence at risk.

The conclusion that can be drawn from this is that tools for assessing domestic violence as a contraindication of mediation have not been properly developed or considered in the South African context.

Recommendations

- Training on screening for domestic violence must be compulsory for social workers mediating, especially with the dawn of compulsory mediation, and court-annexed mediation.
- A resource list of services to victims of domestic violence should be circulated by social work agencies to mediators so that referrals are made efficiently, when necessary.

- More research must be done on the efficacy of mediating where domestic violence is alleged.
- A domestic violence screening tool for South African circumstances must be developed for mediators.

6.2.10 Working with other professionals and agencies

Work as a mediator brings social workers into contact with other professionals. This contact has a number of strong benefits, but participants also identified a number of challenges. The benefits of working together included the value derived from having access to the expertise of another professional. Many of the challenges revolved around tensions around different values and approaches.

The conclusion that can be drawn from the findings is that mediators must be prepared to interact with other professionals. The benefits are numerous but the mediator must be prepared to address the challenges.

Recommendations

- Social workers should receive some training in the typologies of law and education in order to better communicate meaningfully with other professionals.
- Social workers should develop a full resource list to refer clients for other services flowing out of the mediation process.
- Outcomes and proposals from a mediation process should be recorded by the social worker mediating, rather than detailed accounts of the actual process or interactions.
- Social workers should act professionally at all times so as to represent the Social Work profession with dignity.

5.2.11 Social worker experience of conflict and mediation

Social workers indicated that social work skills are strongly compatible with mediation. This confirms the faith that the legislators of the Children's Act placed in social workers by naming them as appropriate mediators in an array of family disputes.

The conclusion that can be drawn from this is that mediation is a methodology that social workers should feel confident undertaking. The skills used in different areas of social workers are highly transferable into the field of mediation.

Recommendation:

- Social workers should advocate strongly in favour of mediation; and in favour of social workers mediating.
- Mediation training should be offered by universities at undergraduate level in order to draw on social work skills, while differentiating it from other social work services.

5.3 GENERAL COMMENTS

It is clear from the findings that mediation has been incorporated into the work of social work agencies, that social workers have the required skills to conduct mediation, and that social workers meet a strongly felt need in communities when they mediate. At the same time, the findings give the sense that this is not a well-developed area of practice of social workers and much can be done to support social workers mediating in terms of the Children's Act 38 of 2005.

5.4 FURTHER RESEARCH

The results of this study indicate various areas which would provide rich soil for future research:

5.4.1 Aspects of domestic violence and mediation

The most pressing research is required around domestic violence and its relationship with mediation. Areas of research could include the development of a South African domestic violence screening model for mediation, and developing protocols for keeping children and victims safe where domestic violence is found in the course of a mediation process.

5.4.2 Child participation

Research is required on the meaning of Section 10 of the Children's Act 38 of 2005. Research must suggest models for child participation which do not harm the child or affect the family system adversely.

5.4.3 Work with other professionals, agencies and Court

Finally, research into the meanings, typologies and working collaboratively with other professionals would be useful to a social worker mediator. The social worker mediator would benefit from insights into different understandings of the Children's Act and mandates of the professions.

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ADDENDUM A: SEMI-STRUCTURED INTERVIEW SCHEDULE

UNIVERSITY OF STELLENBOSCH

DEPARTMENT OF SOCIAL WORK

SEMI-STRUCTURED QUESTIONNAIRE

**The mediation of family disputes in terms of the Children's Act 38 of 2005:
experiences and views of social workers**

All information recorded in the questionnaire will be regarded as confidential.

Individual views or respondents' names will not be made known. Please answer the following questions honestly.

1. CONTEXT OF SOCIAL WORK PRACTICE

1.1 What services are offered by you/your organisation:

.....

.....

.....

2. IMPACT OF THE CHILDREN'S ACT 38 OF 2005:

The Children's Act 38 of 2005 introduces new ways that social workers might interact with clients. This section seeks to explore the changing role of the social worker under this Act.

2.1 What changes has the Act brought about in services offered by you to

2.1.1 families in dispute;

.....

.....

2.1.2 unmarried fathers;

.....

.....

2.1.3 parents/co-holders of parental responsibilities and rights;

.....

.....

2.1.4 referrals from court?

.....

.....

2.2 What impact of the Act do you see on clients and client groups regarding

2.2.1 how parental responsibilities and rights are exercised;

.....

.....

2.2.2 how parents participate in the care and well-being of their children?

.....

.....

2.3 What differences are evident in how much mediation is taken up in your agency/practice since the implementation of the Children's Act?

.....

.....

.....

3. IMPACT OF MEDIATION ON PRACTICE:

The new demands of the Act may have implications on the professional skills and knowledge required to offer ethical services to clients. This section focuses on how these challenges have been met.

3.1 Have you undergone specific training in mediation?

Yes	
No	

3.1.1 If so, please tick, as appropriate:

Basic family and divorce mediation	
Dealing with Domestic Violence in mediation	
Working with children in mediation	
Advanced mediation techniques and skills	
Other (please specify)	

3.2 How has mediation been integrated into the working of the rest of the organisation/your practice?

.....

.....

.....

.....

4. DIFFERENTIATING MEDIATION FROM OTHER SERVICES:

Mediation may be one of the many services that you offer. This section seeks to explore how you differentiate between the other services that you/your organisation offers and mediation.

4.1 How is a mediation case identified by you/your organisation?

.....

.....

.....

4.2 How is the protocol for mediation cases different to other services in the organisation/practice, if at all?

.....

.....

.....

5. THE NATURE OF CONFLICTS

Families may find themselves in different kinds of disputes. Social workers become involved in a broad spectrum of these disputes. This section seeks to identify the nature of conflict that social workers mediating typically encounter.

5.1 What kind of disputes do you mainly mediate? (tick as appropriate)

5.1.1 Unmarried parental responsibilities and rights	
5.1.2 Sharing of parental responsibilities and rights	
5.1.3 Separation/divorce	
5.1.4 Dispute over exercise of parental responsibilities and rights	
5.1.5 Other (specify)	

6. MODELS FOR MEDIATION INTERVENTION

Mediation practice is broadly divided into facilitative, evaluative, and transformative approaches. This section seeks to explore which approach is favoured by social workers mediating.

6.1 Which mediation model would you say you use? (Circle the most appropriate one)

Facilitative	Evaluative	Transformative	Other (specify)
--------------	------------	----------------	-----------------

6.2 What factors are important for you when choosing a mediation model?

.....

.....

6.3 Which of the following stages in a mediation process do you routinely implement?
(Tick the box, if the step applies to your mediation process)

6.3.1 Separate intake interviews are conducted with each party	
6.3.2 Screening for domestic violence and appropriateness takes place	
6.3.3 A mediation agreement is entered into	
6.3.4 The mediator presents an opening statement to both parties	
6.3.5 Defining the issues: each party is invited to make an opening statement	
6.3.6 Gathering information: each party is requested to share information openly in the process	
6.3.7 Exploring needs and interests: the negotiation process between the parties is facilitated	
6.3.8 Generating options for settlement: brainstorming and other techniques are used to help clients break impasse	
6.3.9 Evaluating options in problem solving: options are weighed up and chosen	
6.3.10 Settlement: an agreement is drafted by the mediator	
6.3.11 The mediator is debriefed regarding the mediation	

7. CHILD PARTICIPATION

International trends are for children to be involved in decisions that affect them. The Children's Act 38 of 2005 also addresses child participation. This section explores how this is operationalised in practice.

7.1 Do children involved in the dispute participate in your mediation process? (tick the appropriate answer)

Yes	
No	
Sometimes	

7.2 If children participate in your process, when and how do they participate?

.....

.....

.....

.....

7.3 What criteria do you employ to determine when it is appropriate for a child to participate in the mediation process, or not?

.....

.....

.....

.....

.....

8. DEALING WITH DOMESTIC VIOLENCE

Screening is part of the early phase of the mediation process. Screening for domestic violence is a particularly sensitive. This section seeks to explore how this screening is carried out in your practice/by your organisation.

8.1 How do you conduct pre-mediation screening for domestic violence, if at all?

.....

.....

.....

8.3 What process do you follow where an allegation is made of domestic violence?

.....

.....

.....

9. WORKING WITH OTHER PROFESSIONALS AND AGENCIES

The mediation field brings various professionals in close proximity of each other due to the complex nature of disputes. The following questions are intended to develop an understanding of the relationships across the different professions.

9.1 Which other professionals do you work with in the mediation field?

.....

9.2 What functions does each professional fulfil (where appropriate)?

.....

.....

.....

9.3 Do you take notes, or produce reports of the mediation sessions?

Yes	
No	

If so, for what purpose are these used?

.....

.....

9.3 Name the biggest advantages of working with other professionals in the mediation field.

.....

.....

.....

9.4 Name some challenges in working with other professionals in the mediation field.

.....

.....

.....

10. SOCIAL WORKER EXPERIENCE OF CONFLICT AND MEDIATION

A social worker possesses a wide array of skills that are relevant for resolving conflict. This section explores some of the skills most used, and the compatibility of social with mediation.

10.1 Which of your social work skills would you say you use most in mediation?

.....

.....

.....

10.2 On a scale of 1 to 10, how would you rate the compatibility of mediation with social work (1 being incompatible and 10 being absolutely compatible)?

1 2 3 4 5 6 7 8 9 10

10.3 In what way does mediating as a social worker create any ethical dilemmas for you?

.....

.....

.....

10.4 What are some of the benefits you see for the clients of mediation?

.....

.....

.....

10.5 Are there other interventions that you feel might work better than mediation to resolve conflict?

.....

.....

.....

Thank you for your participation in the questionnaire.

ADDENDUM B: CONSENT FORM TO PARTICIPATE IN RESEARCH



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jou kennisvennoot • your knowledge partner

STELLENBOSCH UNIVERSITY CONSENT TO PARTICIPATE IN RESEARCH

THE MEDIATION OF FAMILY DISPUTES IN TERMS OF THE CHILDREN'S ACT 38 OF 2005: EXPERIENCES AND VIEWS OF SOCIAL WORKERS

You are asked to participate in a research study conducted by Mark Collett, a masters student from the Social Work Department at the University of Stellenbosch. The results of this study will become part of a research report. You were selected as a possible participant in this study because you are a social worker involved in mediating in terms of the Children's Act 38 of 2005.

1. PURPOSE OF THE STUDY

The aim of the research is to provide an insight into the role of social work mediators mediating family disputes in terms of the Children's Act 38 of 2005. Towards this end the objectives of the study will be:

- 1) to discuss the nature of family conflict leading to family disputes and to describe mediation as a strategy for dealing with family disputes;
- 2) to explain innovations and implications of the promulgation of the Children's Act 38 of 2005;
- 3) to explain the changing role of social workers helping to resolve family disputes in terms of the Children's Act 38 of 2005;
- 4) to investigate the experiences and views of social workers mediating family disputes, including personal and cultural influences.

2. PROCEDURES

If you volunteer to participate in this study, we would ask you to do the following:

A semi-structured interview will be utilized to gather information confidentially. You need not indicate your name or any particulars on the interview schedule.

3. POTENTIAL RISKS AND DISCOMFORTS

Any uncertainties on any of the aspects of the schedule you may experience during the interview can be discussed and clarified at any time.

4. POTENTIAL BENEFITS TO SUBJECTS AND / OR TO SOCIETY

The results of this study will inform welfare organisations on how best to implement mediation strategies, and to support social workers mediating in terms of the Children's Act 38 of 2005. This information could also be used by welfare organisations for further planning in service delivery.

5. PAYMENT FOR PARTICIPATION

No payment in any form will be received for participating in this study.

6. CONFIDENTIALITY

Any information that is obtained in connection with this study and that can be identified with you will remain confidential and will be disclosed only with your permission or as required by law. Confidentiality will be maintained by means of coding where each questionnaire is numbered. All questionnaires will be managed, analysed and processed by the researcher and will be kept in a safe place.

7. PARTICIPATION AND WITHDRAWAL

You can choose whether to be in this study or not. If you volunteer to be in this study, you may withdraw at any time without consequences of any kind. You may also refuse to answer any questions you don't want to answer and still remain in the study. The researcher may withdraw you from this research if circumstances arise which warrant doing so, eg should you influence other participants in the completion of their questionnaires.

8. IDENTIFICATION OF STUDENT-RESEARCHER

If you have any questions or concerns about the research, please feel free to contact:
Professor Sulina Green (Supervisor), Department of Social Work, University of Stellenbosch,
Tel. 021-808 2070, E-Mail: sgreen@sun.ac.za.

9. RIGHTS OF RESEARCH SUBJECTS

You may withdraw your consent at any time and discontinue participation without penalty. You are not waiving any legal claims, rights or remedies because of your participation in this research study. If you have questions regarding your rights as a research subject, contact Ms Maléne Fouché [mfouche@sun.ac.za; 021 808 4622] at the Division for Research Development.

SIGNATURE OF RESEARCH SUBJECT OR LEGAL REPRESENTATIVE

The information above was described to me the participant by Mark Collett in English and the participant is in command of this language or it was satisfactorily translated to him / her. The participant was given the opportunity to ask questions and these questions were answered to his / her satisfaction.

I hereby consent voluntarily to participate in this study.

Name of Participant

Signature of Participant

Date

SIGNATURE OF INVESTIGATOR

I declare that I explained the information given in this document to _____ [name of subject/participant]. [He / She] was encouraged and given ample time to ask me any questions. This conversation was conducted in English and no translator was used.

Signature of Investigator

Date

ADDENDUM C: APPROVAL LETTER FROM STELLENBOSCH UNIVERSITY'S DEPARTMENTAL ETHICS SCREENING COMMITTEE (DESC)



APPROVAL NOTICE

23 August 2018

Project number: HS1212/2018

Project title: The mediation of family disputes in terms of the Children's Act 38 of 2005: experiences and views of social workers.

Dear Mr Mark Collett

Your REC application received on 14 August 2018 was reviewed and approved by the REC: Humanities.

GENERAL COMMENTS:

The Department Ethics Screening Committee: Social Work (DESC) reviewed and approved this low risk project on 4 June 2013. The project with the DESC's report of approval did not reach the office of the Research Ethics Committee: Humanities and subsequently the researcher did not receive an official letter of REC clearance. Upon receipt of the complete application and a copy of the DESC's review report, the REC: Humanities concurs with the DESC's assessment of the study as low risk and herewith ratifies the DESC's approval granted in June 2013.

Please take note of the General Investigator Responsibilities attached to this letter. You may commence with your research after complying fully with these guidelines.

If the researcher deviates in any way from the proposal approved by the REC: Humanities, the researcher must notify the REC of these changes.

Please use your SU project number (HS1212/2018) on any documents or correspondence with the REC concerning your project.

Please note that the REC has the prerogative and authority to ask further questions, seek additional information, require further modifications, or monitor the conduct of your research and the consent process.

FOR CONTINUATION OF PROJECTS AFTER REC APPROVAL PERIOD

Please note that a progress report should be submitted to the Research Ethics Committee: Humanities before the approval period has expired if a continuation of ethics approval is required. The Committee will then consider the continuation of the project for a further year (if necessary)

*National Health Research Ethics Committee (NHREC) registration number: REC-050411-032.
The Research Ethics Committee: Humanities complies with the SA National Health Act No.61 2003 as it pertains to health research. In addition, this committee abides by the ethical norms and principles for research established by the Declaration of Helsinki (2013) and the Department of Health Guidelines for Ethical Research: Principles Structures and Processes (2nd Ed.) 2015. Annually a number of projects may be selected randomly for an external audit.*

If you have any questions or need further help, please contact the REC office at cgraham@sun.ac.za.

Sincerely,



Clarissa Graham

REC Coordinator: Research Ethics Committee: Human Research (Humanities)

*National Health Research Ethics Committee (NHREC) registration number: REC-050411-032.
The Research Ethics Committee: Humanities complies with the SA National Health Act No.61 2003 as it pertains to health research. In addition, this committee abides by the ethical norms and principles for research established by the Declaration of Helsinki (2013) and the Department of Health Guidelines for Ethical Research: Principles Structures and Processes (2nd Ed.) 2015. Annually a number of projects may be selected randomly for an external audit.*

Investigator Responsibilities

Protection of Human Research Participants

Some of the general responsibilities investigators have when conducting research involving human participants are listed below:

- 1. Conducting the Research.** You are responsible for making sure that the research is conducted according to the REC approved research protocol. You are also responsible for the actions of all your co-investigators and research staff involved with this research. You must also ensure that the research is conducted within the standards of your field of research.
- 2. Participant Enrolment.** You may not recruit or enrol participants prior to the REC approval date or after the expiration date of REC approval. All recruitment materials for any form of media must be approved by the REC prior to their use.
- 3. Informed Consent.** You are responsible for obtaining and documenting effective informed consent using **only** the REC-approved consent documents/process, and for ensuring that no human participants are involved in research prior to obtaining their informed consent. Please give all participants copies of the signed informed consent documents. Keep the originals in your secured research files for at least five (5) years.
- 4. Continuing Review.** The REC must review and approve all REC-approved research proposals at intervals appropriate to the degree of risk but not less than once per year. There is **no grace period**. Prior to the date on which the REC approval of the research expires, it is **your responsibility to submit the progress report in a timely fashion to ensure a lapse in REC approval does not occur**. If REC approval of your research lapses, you must stop new participant enrolment, and contact the REC office immediately.
- 5. Amendments and Changes.** If you wish to amend or change any aspect of your research (such as research design, interventions or procedures, participant population, informed consent document, instruments, surveys or recruiting material), you must submit the amendment to the REC for review using the current Amendment Form. You **may not initiate** any amendments or changes to your research without first obtaining written REC review and approval. The **only exception** is when it is necessary to eliminate apparent immediate hazards to participants and the REC should be immediately informed of this necessity.
- 6. Adverse or Unanticipated Events.** Any serious adverse events, participant complaints, and all unanticipated problems that involve risks to participants or others, as well as any research related injuries, occurring at this institution or at other performance sites must be reported to Malene Fouche within **five (5) days** of discovery of the incident. You must also report any instances of serious or continuing problems, or non-compliance with the REC's requirements for protecting human research participants. The only exception to this policy is that the death of a research participant must be reported in accordance with the Stellenbosch University Research Ethics Committee Standard Operating Procedures. All reportable events should be submitted to the REC using the Serious Adverse Event Report Form.
- 7. Research Record Keeping.** You must keep the following research related records, at a minimum, in a secure location for a minimum of five years: the REC approved research proposal and all amendments; all informed consent documents; recruiting materials; continuing review reports; adverse or unanticipated events; and all correspondence from the REC.
- 8. Provision of Counselling or emergency support.** When a dedicated counsellor or psychologist provides support to a participant without prior REC review and approval, to the extent permitted by law, such activities will not be recognised as research nor the data used in support of research. Such cases should be indicated in the progress report or final report.
- 9. Final reports.** When you have completed (no further participant enrolment, interactions or interventions) or stopped work on your research, you must submit a Final Report to the REC.
- 10. On-Site Evaluations, Inspections, or Audits.** If you are notified that your research will be reviewed or audited by the sponsor or any other external agency or any internal group, you must inform the REC immediately of the impending audit/evaluation.

*National Health Research Ethics Committee (NHREC) registration number: REC-050411-032.
The Research Ethics Committee: Humanities complies with the SA National Health Act No.61 2003 as it pertains to health research. In addition, this committee abides by the ethical norms and principles for research established by the Declaration of Helsinki (2013) and the Department of Health Guidelines for Ethical Research: Principles Structures and Processes (2nd Ed.) 2015. Annually a number of projects may be selected randomly for an external audit.*